82-212

Office - Supreme Court, U.S.
FILED
JUL 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. _____

J. TRUETT PAYNE COMPANY, INC.,
a corporation,
Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

C. LEE REEVES
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111

Counsel for Petitioner

Of Counsel:
SIROTE, PERMUTT, FRIEND, FRIEDMAN,
HELD & APOLINSKY, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111

QUESTIONS PRESENTED

1. When there is proof that Chrysler discriminated in sales price against Payne, totaling $81,248 over a 3½ year period, sometimes as much as $300 per car, during each of thirteen separate rebate programs, does the Fifth Circuit's holding that, in order to show a violation of Section 2 (a) of the Robinson-Patman Act, Payne must prove that the result of the price discrimination "is likely to be a *severe* adverse effect on competition" with the favored competitior "likely" to draw sales and profits from Payne impose an overly strict standard of proof on Payne, the disfavored competitor, thereby overruling *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948) and *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969) which permit an inference of the adverse effect on competition when there has been substantial price discrimination?

2. Despite a jury verdict showing that Chrysler Motors violated Section 2 (a) of the Robinson-Patman Act and despite proof of substantial price discrimination in a keen competitive market which would have a reasonable possibility of causing injury to competition, and despite direct proof of a reduction of market share to the disfavored buyer, J. Truett Payne Company, did the Fifth Circuit's decision overruling the jury verdict and directing entry of judgment for Chrysler Motors ignore the principle in *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969), which requires the jury to determine whether or not there was a violation of Section 2 (a) of the Robinson-Patman Act?

3. Whether evidence showing sustained violations of Section 2 (a) of the Robinson-Patman Act, together with evidence of keen competition in the market, relatively small profit margins, substantial price discriminations sufficient to influence retail sales prices and cause a decline in the sales and profits of J. Truett Payne Company so that it eventually went out of business, is sufficient to permit a jury to find under the more lenient standard of proof that Chrysler's violation of the Robinson-Patman Act caused injury or damage to the business or

property of J. Truett Payne Company under Section 4 of the Clayton Act?

4. Whether the evidence showing that Chrysler violated the Act and J. Truett Payne Company suffered substantial price discrimination in the amount of $81,248, coupled with evidence that the increased price was not passed through to Payne's retail customers and with evidence of declining sales and profits, eventually causing Payne to go out of business when its going concern value was between $50,000 and $170,000, is sufficient to permit the jury to find antitrust injury and damages.

TABLE OF CONTENTS

Page

Questions Presented 2

Table of Contents i

Table of Authorities iii

Opinions Below 3

Jurisdiction 3

The Statutes Involved 4

Statement of the Case 4

A. Chronology 4

B. The Facts 5

C. Basis for Federal Jurisdiction in Trial Court 11

Reasons for Granting the Writ 11

I. Summary 11

II. The Rebates Constituted Price Discrimination Which Violated Section 2 (a) of the Act, and the Fifth Circuit's Opinion Imposed an Unreasonably Strict Standard of Proving Injury to Competition 13

III. The Evidence Showed that Chrysler's Section 2 (a) Violation was the Proximate Cause of the Injury to Payne Under Section 4 of the Clayton Act 18

A. There was Actual and Direct Proof of Antitrust Injury 18

B. The Price Discrimination and the Market Conditions in this Case Permit a Jury to Infer Injury to Payne's Business 22

C. The Fifth Circuit's Decision Imposes an Unreasonably Harsh Standard of Proving the Fact of Damage And is Contrary to the Policy of Enforcing the Antitrust Laws 27

TABLE OF CONTENTS – (Continued)

Page

IV. The Amount of Damage was Proved to an Estimated Degree of Certainty Sufficient Under Section 4 of the Clayton Act 28

A. Since the Increase Price was Not Passed Through the Amount of the Price Discrimination Provides a Sufficient Estimate of the Amount of Damage in the Form of Lost Profits 28

B. The Price Discrimination Also Caused Damage in the Amount of the Lost Going Concern Value 30

Conclusion 31

Proof of Service 32

TABLE OF AUTHORITIES

Table of Cases — *Page*

Alterman Foods, Inc. v. FTC, 497 F.2d 993 (5th Cir. 1974) 14

American Motors Corp. v. FTC, 384 F.2d 247 (6th Cir. 1967) 16

Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana), 466 F.2d 1163 (7th Cir. 1972) 11, 12, 22

Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), cert. denied 408 U.S. 928 (1972) 16

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) 27, 28

Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967) 15

Bruce's Juices v. American Can Co., 187 F.2d 919 (5th Cir.), modified on other grounds and rehearing denied, 190 F.2d 73 (5th Cir.) cert. dismissed 342 U.S. 875 (1951) 25

Century Hardware Corp. v. Acme United Corp., 467 F. Supp. 350 (E.D. Wisc. 1979) 21, 28

Chrysler Credit Corporation v. J. Truett Payne Company, Inc. v. Chrysler Motors Corporation, 670 F.2d 575 (5th Cir. 1982) 1, 3

Colonial Stores, Inc. v. FTC, 450 F.2d 733 (5th Cir. 1971) 14

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 19

E. Edelmann & Co. v. FTC, 239 F.2d 152 7th Cir. 1956) 11, 26

Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), cert. denied 853 U.S. 965 (1957) 20, 21, 28

Eye Encounter, Inc. v. Contour Art, Ltd., 81 F.R.D. 683 (E.D.N.Y. 1979) 16

FTC v. Morton Salt Co., 334 U.S. 37 (1948) 2, 11, 12, 15

Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), cert. denied 382 U.S. 959 (1966) 11, 13, 14, 15, 16, 25

TABLE OF AUTHORITIES – (Continued)

Table of Cases — *Page*

Gough v. Rossmoor Corp., 505 F.2d 381 (9th Cir.), cert. denied 440 U.S. 936 (1979) 23

Great Atlantic & Pacific Tea Co., Inc. v. FTC, 557 F.2d 971 (2d Cir. 1977) 14

Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 19, 29

Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220 (5th Cir.), cert. denied 414 U.S. 1136 (1973) 11, 12, 25

Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 984 (5th Cir. 1973) 29

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 19, 29

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 3, 12, 18

Janich Bros., Inc. v. American Distillery Company, 570 F.2d 848 (9th Cir. 1977) 23

Kroger Co. v. FTC, 38 F.2d 1372 (6th Cir. 1971) 15

Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979) 28

National Dairy Products Corp. v. FTC, 395 F.2d 517 (7th Cir.), cert. denied 393 U.S. 977 (1968) 14

Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969) 2, 11, 12, 14, 21, 24

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 24

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 25

Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir.), cert. dismissed 49 U.S. 987 (1974) 28

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 12, 19, 24, 28

TABLE OF AUTHORITIES – (Continued)

Table of Cases — *Page*

Zwicker v. J. I. Case Co., 596 F.2d 305 (8th Cir. 1979) 16

Statutes and Other Authorities

Barber, The Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience, 30 Geo. Wash. L. Rev. 181 (1960) 27

Posner, A Statistical Study of Antitrust Enforcement, 13 J. L. & Econ. 365 (1970) 27

Clayton Act § 4, 15 U.S.C. § 15 ..... 11, 22, 27

Robinson-Patman Act § 2 (a), 15 U.S.C. § 13 ..... 2, 4, 11, 14, 27, 30

28 U.S.C. § 1254 (1) 4

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT*

Petitioner respectfully prays that a Writ of *Certiorari* issue to review the order of the United States Court of Appeals, Fifth Circuit, 670 F.2d 575 (5th Cir. 1982) entered on March 19, 1982, which reversed the judgment of the District Court for the Northern District of Alabama awarding to J. Truett Payne Company, Inc. the sum of Three Hundred Seventy-Three Thousand Seven Hundred Forty-Two and 44/100 Dollars ($373,742.44) for a violation of the Robinson-Patman Act in the case of *Chrysler Credit Corporation v. J. Truett Payne Company, Inc. v. Chrysler Motors Corporation,* No 77-2331.

*Former Fifth Circuit case, § 9(1) of Public Law 96-452, October 14, 1980; decided by Circuit Judges in the Eleventh Circuit as a former Fifth Circuit case.

In addition, Petitioner respectfully prays that a Writ of *Certiorari* issue to review that final order of the United States Court of Appeals, Fifth Circuit, on April 26, 1982, 677 F.2d 117 (5th Cir. 1982) (*En Banc*) which overruled and denied Petitioner's Petition for Rehearing *En Banc*.

QUESTIONS PRESENTED

1. When there is proof that Chrysler discriminated in sales price against Payne, totaling $81,248 over a 3½ year period, sometimes as much as $300 per car, during each of thirteen separate rebate programs, does the Fifth Circuit's holding that, in order to show a violation of Section 2(a) of the Robinson-Patman Act, Payne must prove that the result of the price discrimination "is likely to be a *severe* adverse effect on competition" with the favored competitior "likely" to draw sales and profits from Payne impose an overly strict standard of proof on Payne, the disfavored competitor, thereby overruling *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948) and *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969) which permit an inference of the adverse effect on competition when there has been substantial price discrimination?

2. Despite a jury verdict showing that Chrysler Motors violated Section 2(a) of the Robinson-Patman Act and despite proof of substantial price discrimination in a keen competitive market which would have a reasonable possibility of causing injury to competition, and despite direct proof of a reduction of market share to the disfavored buyer, J. Truett Payne Company, did the Fifth Circuit's decision overruling the jury verdict and directing entry of judgment for Chrysler Motors ignore the principle in *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969), which requires the jury to determine whether or not there was a violation of Section 2(a) of the Robinson-Patman Act?

3. Whether evidence showing sustained violations of Section 2(a) of the Robinson-Patman Act, together with evidence of keen competition in the market, relatively small profit margins,

substantial price discriminations sufficient to influence retail sales prices and cause a decline in the sales and profits of J. Truett Payne Company so that it eventually went out of business, is sufficient to permit a jury to find under the more lenient standard of proof that Chrysler's violation of the Robinson-Patman Act caused injury or damage to the business or property of J. Truett Payne Company under Section 4 of the Clayton Act?

4. Whether the evidence showing that Chrysler violated the Act and J. Truett Payne Company suffered substantial price discrimination in the amount of $81,248, coupled with evidence that the increased price was not passed through to Payne's retail customers and with evidence of declining sales and profits, eventually causing Payne to go out of business when its going concern value was between $50,000 and $170,000, is sufficient to permit the jury to find antitrust injury and damages.

OPINIONS BELOW

The Fifth Circuit's original opinion in this case is reported at 607 F.2d 1133 (5th Cir. 1979) (Appendix p. 25). After granting certiorari, the Supreme Court reversed and remanded the Fifth Circuit in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (Appendix p. 11).

On March 19, 1982, the second opinion of the Fifth Circuit is reported in *Chrysler Credit Corporation v. J. Truett Payne Company, Inc. v. Chrysler Motors Corporation*, 670 F.2d 575 (5th Cir. 1982), contained in the Appendix, p. 1. On April 26, 1982 the Fifth Circuit overruled and denied the Petition for Rehearing En Banc, reported at 677 F.2d 117 (5th Cir. 1982), and set forth at Appendix, p. 10. The Appendix is separately presented from this Petition.

JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, reversing the trial court's judgment in this case and directing entry of judgment for Chrysler was entered on March

19, 1982. Petitioner's Petition for Rehearing *En Banc* was denied on April 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This Petition was filed within ninety days of the Fifth Circuit's order denying a rehearing.

THE STATUTES INVOLVED

The pertinent provisions of the Robinson-Patman Act, 15 U.S.C. § 13, a copy of which in full is set forth at Appendix, p. 56, is set forth below:

> It shall be unlawful for any person engaged in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure or destroy or prevent competition with any person who either grants knowingly or receives the benefit of such discrimination or the customers of either of them . . . .

In addition, 15 U.S.C. § 15 states as follows:

> Any person who shall be in injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the main controversy and shall recover three-fold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. *Chronology.*

This price discrimination case was tried in the United States District Court for the Northern District of Alabama, Southern Division. The jury's verdict of $111,247.78 against Chrysler Motors Corporation (hereinafter called "Chrysler") was trebled and an attorney's fee added, resulting in a judgment against Chrysler in the amount of $373,742.44. Chrysler's

Motion for Judgment Notwithstanding the Verdict or for a New Trial was denied. Chrysler appealed to the Fifth Circuit on June 15, 1977.

The Fifth Circuit originally held that J. Truett Payne Company, Inc. (hereinafter "Payne") had presented insufficient proof of cognizable antitrust injury and insufficient proof of the amount of damages because damage could only be shown by lost sales and profits, and directed entry of judgment for Chrysler pursuant to its Motion for Judgment Notwithstanding the Verdict. 607 F.2d at 1137. However, the Fifth Circuit did not reach the issue of the jury's finding that Chrysler violated the Robinson-Patman Act.

After granting Payne's Petition for Certiorari, the Supreme Court reversed and remanded, holding that since the Fifth Circuit did not reach the issue of whether the Robinson-Patman Act had been violated, then the Court could not tell whether to apply the more lenient standard of proof available when the Act had been violated that permits a wronged party to prove, with a lesser burden, the causation of damage and amount of that damage. 451 U.S. 557, 568.

On March 19, 1982, the Fifth Circuit held that there was insufficient evidence for the jury to have concluded the Act was violated (670 F.2d 575, 581) and also held that Payne had failed to prove cognizable antitrust injury or the amount of that injury. On April 26, 1982, the Fifth Circuit denied a rehearing. 677 F.2d 117.

B. *The Facts.*

The evidence in the trial showed as follows: Payne had been a Chrysler-Plymouth retail automobile dealer in Birmingham, Alabama, since approximately 1944 (TR. 40). Prior to and during a 3½ year period from approximately December 1970 until Payne was forced out of business in May 1974, Payne competed with three other Chrysler-Plymouth dealers[1] in a

[1]Those competing Chrysler dealers were Roebuck Chrysler-Plymouth (sometimes known as Car Center), Central Motors, and Bessemer Chrysler-Plymouth (sometimes known as Hall Motor Company, and later changed in 1972 to Vestavia Chrysler-Plymouth).

market of exceedingly tough competition in Birmingham-Jefferson County, Alabama. Customers shopping for new cars compared Payne's prices with each of the other three Chrysler-Plymouth dealers competing with Payne (TR. 45-46; 124).

From November 1970 through May 1974, Chrysler created approximately sixteen rebate or incentive programs relating to the retail sales (non-fleet) of new cars, each program lasting several months, under which it would make rebate payments to those dealers on the new cars sold by the four competing Chrysler-Plymouth dealers in the Birmingham, Alabama market area. Chrysler unilaterally assigne deach dealer a separate and different quota for wholesale purchases and/or retail sales which each dealer had to satisfy in order to obtain the rebate payments. The rebate payments Chrysler made to a dealer on a particular car during a rebate program reduced the price of the new car purchased from Chrysler by the dealer and had an effect on and influenced the price charged the customer by a dealer (TR. 56; 62; 95; 124-125; 256; 617-618).

In almost every rebate program, Chrysler assigned Payne a higher quota than its competing dealers, and Payne had to meet that higher quota in order to receive a rebate payment. Payne had to either purchase more new cars from Chrysler or sell more new cars in order to obtain a rebate payment from Chrysler reducing the costs of those cars. Compared to the other dealers, Payne actually paid more for almost every car involved in the rebate programs because it could not meet the high quotas. The total price discrimination against Payne during a three and one-half year period of the rebate programs was $81,248.94. As a result of the higher quotas assigned Payne and the rebates paid by Chrysler to the other qualifying dealers, Payne lost sales because it was at a trade disadvantage with those competing dealers (TR. 65-67; 68-69), Payne could not meet the low price that the other Chrysler dealers were offering in the Birmingham market (TR. 91, 124) These rebate programs in issue were run almost continuously so that almost every car that was sold at retail by Payne and its competitors was covered by a rebate program.

Because of the price disadvantage at which the rebate programs put Payne, Payne ended up forcing business in order to make a sale and was losing some customers because of higher price (R. 65-69; 91-92; 94-95; 126-127). The price of a new car is ordinarily composed of two elements: (1) the amount allowed by a dealer for a used car traded in by the customer. and (2) the amount charged by the dealer on the new car. Many times in order to make a sale of a new car, Payne had to over-allow on the used car traded in by the customer (TR. 55; 711-712). Payne had to sell at a smaller profit than it could afford to sell and still compete effectively, and generally it did not meet the lower prices of the other dealers (TR. 91; 124). Payne was losing customers and sales because of the rebate programs (TR. 65-67; 68-69; 91-92; 94-95; 1267-127). For the last five years of its operations, Payne lost money, primarily because of its losses in the used car operations (TR. 538-539).

There was clear evidence that the price discrimination caused a drop in Payne's share of the market. The year 1968 is the base period with which to compare Payne's sales and profits during the period of discrimination from 1970-1974 in issue since the only non-discriminatory year for which there is evidence of Payne's share of the market is 1968. In 1968, Payne made net profits of $36,140.62 and sold 658 cars at retail (Pl. Ex. 61). According to Chrysler's own witness, Payne sold 40% of the total new car market in 1968 (TR. 364), or about a 31.5%[2] share of the retail (non-fleet) market for 1968. Clearly then, the price discrimination to the favored dealers caused a

---

[2]Payne's total sales in 1968 were 991 units—658 retail and 333 fleet (Pl. Ex. 61). The total Birmingham market in 1968 would thus have been 2,478 cars, which is derived from Chrysler's testimony that Payne sold 40% of the total new car market. Given the fact that the other dealers always had fewer fleet sales than Payne, their total during 1971, 1972 and 1973 averaging 13.4% of the market's fleet sales, the retail (excluding fleet) market in 1968 would have been approximately 2,089 cars, which is calculated by using their same average percentage of total fleet sales (13.4%) (See Def. Ex. 31). Thus, Payne would have had a 31.5% share of the retail market (excluding fleet) in a year where there were no discriminatory rebates shown.

reduction in Payne's share of the retail new car market during 1970 through 1973. In 1970, Payne's share of the retail (non-fleet) sales of new cars had dropped to 24% of the market; in 1971, it was 26.9%; and in 1972, it was 23%. In 1973, after Chrysler reduced the fair share for Payne to 25.99%, Payne's share of the retail non-fleet market increased to 25% (*See*, Def. Ex. 31). During the years 1971 and 1972, the Birmingham market was expanding in the number of retail non-fleet sales, while Payne's share was declining.

The rebates per car paid by Chrysler to each dealer under those rebate programs reduced the dealer's cost on that car (TR. 138; 527; 618). Dr. Ignatin, an economist, is thoroughly familiar with the car market in Birmingham and did several studies about the Birmingham market (TR. 201; 695). Chrysler's rebate programs reduced competition in the Birmingham market between Chrysler dealers and had an adverse effect on competition (TR. 222). As a result of the rebate payment to the competing dealer, Payne could not compete as well with the other dealers because it got less of a price reduction on the cars (TR. 203; 256-257). The rebates actually injured Payne's business by (1) causing it to lose profits it would have otherwise made had Chrysler's prices been equal, and (2) diminishing its ability to compete for sales (TR. 256-258).

The effects of the price discrimination are most evident when compared to the dealers' tight profit margins. Profit margins on the used cars traded in by the customer were very small, especially when compared to the amount of rebates per car. The net profits per used car in 1971 ranged from $13 for Payne to $118 for Vestavia; in 1972, from $27 for Payne to $90 for Roebuck; in 1973, from $12 for Payne to $142 for Central (Def. Ex. 31; 40; and 41).

It is well known in the automobile industry that all dealers discount off list price in setting the retail price of the car for a customer. Because of these rebate payments, Payne could not discount its cars from list price as much as it could have if it

had received the same rebate per car as the other dealers competing with Payne at that time. Other competing dealers therefore did not have to discount their price on new cars as much as they otherwise would have done had Payne received an equal rebate per car from Chrysler. The effect of the discrimination against Payne under the Chrysler rebate programs was to maintain a retail price to a consumer at artificially high levels. Thus, by reducing the actual competition in the market, the rebates had an adverse effect on competition and on the consuming public (TR. 203-204; 205; 222; 255).

The price discrimination from the rebate programs was one of the causes of Payne's going out of business in May, 1974 (TR. 68-69; 100; 705-706). Without those price discriminations, Payne's expenses would have been less, it could have offered more customer-attracting services or advertising (which the other dealers could do with more rebates and therefore increase their sales), and Payne could definitely have stayed in business. Evidence of value of the Payne business in May 1974, when it was forced out of business, ranged between $50,000 and $170,000. (TR. 75-76; 115-116; 210-218).

Dr. Ignatin used a capitalized stream of profits method in giving his opinion that the business was worth $170,000. Chrysler's expert economist, Dr. Geisel, agreed that Doctor Ignatin's second method of valuing the busines by capitalizing the profit stream is a correct method of valuing a business (TR. 601, 603). Dr. Ignatin testified there was price discrimination against Payne from all but three rebate programs. He calculated for each program how much more money the favored dealers received on a per car basis than did Payne under that same program, as well as the amount of discrimination resulting to Payne in each program (See, Pl. Ex. 37-53; TR. 140-184; 222-223; App. 36-53). In thirteen out of sixteen rebate programs, Payne was disfavored and damaged[3] since it did not receive as great a rebate per car as did the more favored dealers in that program. During the 3½ year period in issue, the total

[3]See results of those rebate programs in the Appendix, pp. 36-53.

amount of price discrimination against Payne on the automobiles it sold during this period was $81,248.94 (TR. 191).

Eight of the sixteen rebate programs established quotas based on a dealer's "fair share" as defined by Chrysler. The "fair share" ultimately became the basis of the "quota" to be attained before any rebate is paid to the dealer under the majority of the rebate programs. According to Chrysler, "fair share" represents the percentage of the total Birmingham market of auto sales which a dealer "should" attain. It was unilaterally set by Chrysler and remained in effect until changed by Chrysler (TR. 296-332). The "fair share" percentages assigned to each dealer during 1970 through 1972 were as follows: Payne – 40.19%; Bessemer – 12.99%; Central Motors – 25.77%; Roebuck – 21.05% (Pl. Ex. 36).

Bessemer Chrysler-Plymouth relocated from Bessemer to Vestavia in May 1971. Chrysler knew that by moving Bessemer Chrysler-Plymouth to Vestavia and into Payne's trading zone, the re-location would take away some of Payne's customers and business (TR. 358-359), but Payne had to suffer with a forty percent "fair share" quota until Chrysler got around to reallocating this quota in 1973 (TR. 434). Payne's new "fair share" was reduced to 25.99% effective in 1973 (TR. 319-321). The new "fair shares" of each dealer as of January 1973 were: Payne – 25.99%; Roebuck – 25.16%; Central – 25.43%; Vestavia – 23.42% (Pl. Ex. 36).

The purpose of the rebate programs was to gain a larger share of the car market for Chrysler compared to its competitors by allowing it to sell more cars to its dealers (TR. 444, 448, 479). These rebate programs contained, for the most part, a wholesale objective program or a retail objective program or, allocated to each dealer on the basis of its assigned fair share of the Birmingham market (TR. 449-450; 465; 488-491). The jury obviously found the fair share unfair and unreasonable to Payne.

C. *Basis for Federal Jurisdiction in Trial Court.*

This case was brought in the trial court under the Robinson-Patman Act, 15 U.S.C. § 13, and under Section 4 of the Clayton Act, 15 U.S.C. § 15, which permit a suit in the United States District Court by any person who shall be injured in his business or property as a result of anything forbidden in the antitrust laws, and specifically the Robinson-Patman Act.

REASONS FOR GRANTING THE WRIT

I. Summary.

The Fifth Circuit's decision improperly substitutes its judgment on the facts for that of the jury, and severely undermines private plaintiffs' rights to enforce the Robinson-Patman Act. It imposes an unreasonably strict standard of proof for showing violation of the Robinson-Patman Act and for showing causation of antitrust damage and the amount of that damage. The Fifth Circuit's opinion requires that a disfavored competitor must prove that the price discrimination is "likely to be a severe adverse effect on competition" and that the "likely effect" of the price discrimination is to permit the favored competitor to draw sales and profits away from the disfavored competitor. 670 F.2d at 580. It ignores the evidence which clearly would permit a jury to find violation of the Act and conflicts with the following decisions of the United States Supreme Court and other Circuit Courts of appeal which have held that a jury is entitled to infer a violation of the Act and injury to the plaintiff when the plaintiff has been disfavored by substantial price discriminations in a market of keen competition: *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969); *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948); *Hanson v. Pittsburgh Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136; *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972); *E. Edelmann & Co. v. FTC*, 239 F.2d 152; (7th Cir. 1956); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir.) *cert. denied*, 382 U.S. 959 (1966).

The decision below should be reviewed because it erroneously substitutes the court's own judgment of the facts (*i.e.*, that there was no price discrimination which could possibly have adversely affected competition or injured Payne) in the face of *clear* evidence from which the jury could determine directly, or by inference, that there was substantial price discrimination in the context of keen competition causing Payne to lose a large part of the market share it had before the discrimination and causing injury to the consumers by maintaining an artificially high sale price.

Since there was a violation of the Act, the more lenient standard of proving antitrust injury and the amount of damages is applicable and should have been applied by the Fifth Circuit as set forth in this Court's earlier opinion in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-568 (1981). The market in which Payne competed was one of exceedingly tough competition where customers compared the prices of the various competing automobile dealers. The amount of the price discrimination of the various automobiles on which Chrysler reduced the price to Payne's competitors was substantial, sometimes as much as $300 per car.[4] Since the price discriminations were substantial compared to the dealer's profit on a typical sale, Payne's business showed losses during the relevant time of price discriminations and a profit in 1968 when there was no price discrimination, and a loss of market share after the price discrimination, then the Fifth Circuit should have permitted the jury's finding of a violation of the Act and antitrust damages to stand. *FTC v. Morton Salt Co., supra* at 50; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969); *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969); *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972); *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973) *cert. denied* 414 U.S.

---

[4]See for example Plaintiff's Exhibit 52, attached to the Appendix at p. 51.

1136; *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir.) *cert. denied*, 382 U.S. 959 (1966).

The Fifth Circuit refused to apply the principles of the above cited cases. In effect, the Fifth Circuit has continued to look for proof of lost sales or profits resulting from the price discrimination in order to prove a violation of the Act. 670 F.2d at 580. This reasoning overlooks the crucial fact that, during the 3½ years of price discrimination, Payne was reducing its sales price, over-allowing on its used car trade-ins in order to maintain its sales volume, and not passing on its increased costs to its customers. Thus there would not have been a substantial loss of market share during the price discrimination. But there would have been a substantial loss (which in fact occurred in Payne's business) and a lessening of Payne's capital position and ability to compete against its competitors. Also, the court ignored the evidence showing a large decline in Payne's market share since 1968, a year where there was no price discrimination. These latter facts were proved, as well as the fact that the price discrimination was one of the factors causing Payne to go out of business. (*See, e.g.*, TR. 97-100; 706). At the time Payne went out of business, its going concern value was between $50,000 and $170,000, thereby meaning that the jury had adequate grounds for assessing damages of $111,247.48.

II. The Rebates Constituted Price Discrimination Which Violated Section 2(a) of the Act, and the Fifth Circuit's Opinion Imposed An Unreasonably Strict Standard of Proving Injury to Competition.

The Fifth Circuit held that no violation of the Act was proved because of a dearth of "documentary" evidence showing a possibility of lessening competition, the only evidence proved being a 4% drop in Payne's market share in 1972. However, Payne proved much more than that as seen from the evidence cited below!

All witnesses testified that the rebates reduced the dealers' cost of new automobiles (TR. 256, 617-618). Those reductions,

under the rebate programs in issue, favored the other three dealers during each program much more than they favored Payne. The retail customer had to pay a higher price than would otherwise have been the case in the absence of the rebate payments. This was so because, since the dealers discount to their customers off the list price, the favored dealers discounted slightly less off the list price than they would have if Payne had been receiving the same per unit rebates. The dealers enjoying the price discrimination were insulated from the competitive forces in the market and did not have to compete as vigorously, thereby making the retail price to the ultimate customer higher while, at the same time, lessening Payne's ability to compete. (TR. 203-204; 255-257).

Payne was caused to lose a large share of the market by the rebate programs. In 1968, Payne had 31.5% of the retail market when there was no price descrimination. It dropped to 25% by 1973 after 4 years of the price discrimination.

At the very least, the evidence was sufficient for the fact finder to infer the possibility of injury to competition, thereby showing a violation of the Act. *Perkins v. Standard Oil Company of California,* 395 U.S. 642, 648 (1969); *Great Atlantic & Pacific Tea Co., Inc. v. FTC,* 557 F.2d 971, 980-81 (2d Cir. 1977); *Altermon Foods Inc. v. FTC,* 497 F.2d 993, 999 (5th Cir. 1974); *Colonial Stores, Inc. v. FTC,* 450 F.2d 733, 739-40 (5th Cir. 1971); *Kroger Co. v. FTC,* 38 F.2d 1372, 1378-79 (6th Cir. 1971); *National Dairy Products Corp. v. FTC,* 395 F.2d 517, 522 (7th Cir.) *cert. denied,* 393 U.S. 977 (1968). As pointed out by the Fifth Circuit in *Foremost Dairies, Inc. v. FTC,* 348 F.2d 674, 680 (5th Cir.), *cert. denied* 382 U.S. 959 (1966), injury may be inferred even if the favored customer did not undersell his rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers; *see also National Dairy Products Corp. v. FTC, supra* at 522.

Another element of damage to Payne and hence to competition, is that the price discrimination in the rebate programs was a cause of Payne's business closing. When a city the size of

Birmingham loses a dealer which had been profitable for over twenty years until about 1969 (*See* Def. Ex. 1, p. 35), and whose slow decline resulted after the institution of price discrimination in the rebate programs, there must have been an adverse effect on competition. In *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir. 1965), the court held that the possibility of competitive injury may be inferred when there is evidence that the price differential is substantial enough to cut into the purchaser's profit margin and the price reduction afforded by the discrimination would permit the buyer a significant saving and have an effect on the decisions of the customers in the market. Dr. Ignatin and Mr. Payne testified that buyers of automobiles do a lot of price comparison since a car is such a high priced item (TR. 45-46; 124; 665). With the rebates as high as $300 on a particular program (*See*, for example, Pl. Ex. 52; App. 51), it can easily be seen that such a price reduction could aid a dealer's profit margin substantially and influence the consumer in buying from the favored dealer.

The trial judge properly charged the jury on the various elements of a *prima facie* § 2 (a) violation (TR. 795-799), and that the amount of price discrimination was *not* automatically the amount of any damages it might assess (TR. 805-806). The jury found that there was a violation of the Act. Certainly there was the possibility of lessening competition which is all the Act requires. The statute only requires that the price discriminations have a "reasonable possibility" that one of the proscribed effects will occur. *FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967). In this case, Payne proved the necessary elements for a *prima facie* Robinson-Patman Act, § 2 (a) violation: (1) two or more sales in interstate commerce; (2) at different prices; (3) contemporaneous in time; (4) made by Chrysler to Payne and the other dealers; (5) of cars of like grade and quality; (6) that the favored dealers were engaged in competition with Payne; (7) that the effect of the price discrimination may have a possibility of lessening competition or injuring competition between the dealers who receive the benefits of the discrimi-

nation. *See Zwicker v. J. I. Case Co.*, 596 F.2d 305, 308, (8th Cir. 1979); *Belliston v. Texaco, Inc.*, 455 F.2d 175, 178 (10th Cir.), *cert. denied* 408 U.S. 928 (1972); *Eye Encounter, Inc. v. Contour Art, Ltd.*, 81 F.R.D. 683, 690 (E.D.N.Y. 1979).

To support a showing of actual injury to competition, one must only prove that a manufacturer is selling its goods to some customers substantially cheaper than it sells the goods to the competitor of those customers. *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948):

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a reasonable possibility that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. *This showing in itself is sufficient* to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence. (Emphasis added.)

In *American Motors Corp. v. FTC*, 384 F.2d 247 (6th Cir. 1967), the court held that once a *prima facie* case of price discrimination is made out and the proof shows that the seller gave discounts of slightly more than 3% to several favored customers, but did not grant similar discounts to many of its other customers, then there can be an inference that there was a reasonable possibility that competition was injured from the price discrimination. No lost sales need be proved, nor is it necessary to prove that the discounts equalled or exceeded the amount of the profit on the sales.

The rebated price discrimination varied from about $25 to $300 per car, depending on the program and the car model. Assuming the average dealer cost of a car to be about $3,500,[8] the rebates varied from slightly under 1% to over 8% of the dealer cost. Thus, there should be no question that when one

[8] An approximate average from the cost of sales figures on the third page of each Dealer Financial Statement, Pl. Ex. 17-35.

dealer, Payne, almost always received less rebates per car, there exists a reasonable possibility of lessening competition in general and of injuring Payne's ability to compete with the other dealers. The normal laws of price and demand in the market place insure that will occur.

Proof that the Fifth Circuit applied the wrong standards to determine if there was a violation of § 2 (a) of the Act is shown in the Court's convoluted reasoning that the average difference in the rebate payments over the relevant period amounted to only $11 per car between the best performing dealer and the worst one. 670 F.2d at 581. This piece of information is absolutely useless since the dealers' inventory of new cars turned over about every sixty to ninety days (TR. 60; 82-83) and Chrysler was paying a different rebate on different model cars which varied from program to program, each program lasting only two or three months. The dealers were competing during each program when the rebate that each received on each car would have been extremely important in determining the ultimate resale price. Therefore, the fact that over a 3½ year period, the "average" of total rebates received, when divided by the total number of *different* model cars, was an $11 difference between the highest and lowest performing dealer is an average of meaningless figures since it is not within a contemporaneous time frame and does not relate to rebates on cars of like grade and quality.

The sales price from Chrysler to each dealer for a car of like grade and quality during a simultaneous time frame (the running of the rebate program) is the crucial issue for determining whether or not price discrimination exists. It is during the running of each program that Payne will suffer when the competitors are able to undersell Payne or use the rebates for customer attracting devices such as advertising, incentives to salesmen, etc.

Chrysler paid larger rebates in some programs for the sales of higher priced cars, and Payne sold more higher priced cars (Chrysler and Imperial) than did the other dealers, getting

large rebates in those programs. Therefore, Payne's total rebates over the 3½ year period would have been increased somewhat by the fact that it did well on the higher priced cars; but it was also competing in sales of lower priced cars on which it did not receive nearly the same per car rebates during that 3½ year period. Therefore, the so-called "average" of the rebate payments per automobile is irrelevant for purposes of price discrimination. What is clear from the evidence is that Payne's business was severely injured from the rebated price discrimination *during* each program since there was much more than an $11 difference per car during each program.[6]

III. The Evidence Showed That Chrysler's Section 2(a) Violation Was the Proximate Cause of the Injury to Payne Under Section 4 of the Clayton Act.

A. *There Was Actual and Direct Proof of Antitrust Injury.*

The Fifth Circuit erroneously took away the jury's decision that there was antitrust injury. After proving a violation of § 2 (a) o fthe Robinson-Patman Act, Payne's burden of proving the violation caused damage under § 4 of the Clayton Act, and the amount of that damage, is somewhat lessened. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981). The impact of the higher price from Chrysler to Payne cannot be measured only in terms of exactly how many sales were lost or "could have been made" by Payne had the price from Chrysler to Payne been equal to the price offered by Chrysler to the other competing dealers. Proving the number of lost sales is very difficult at best, extremely expensive, and sometimes cannot be done with the number of variables involved. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

---

[6]For example, in Pl. Ex. 42, (Appendix 41), which shows the results of the rebate program "Winter Profit Days", from November 21, 1971 through January 31, 1972, Payne received no rebates on the various model cars covered in that program, while the other dealers received rebates of $35.00 to $150.00 per car model.

Rather, proof of damage can be shown by other means such as substantial price discrimination over a substained period, declining sales and profits, loss of market share compared to a period where there was no price discrimination, failure of Payne to pass through to the customers the amount of the price discrimination, and Payne's going out of business. Furthermore, Payne need not show that Chrysler's price discrimination was the sole cause of the damage to its business. Payne need only show that Chrysler's illegal conduct was a material cause of some damage. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9 (1969); *Continental Oil Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962).

The following direct proof, some of which has not been pointed out to this Court by Prior briefs, proved competitive injury caused by the price discrimination:

(1) Payne went out of busness because it had to pay the higher costs of the price discrimination (TR. 68-69; 706).

(2) Payne lost substantial numbers of sales and profits caused by the price discrimination. In 1968 when there was no price discrimination, Payne sold 658 new cars at retail and made a net profit of $36,140.62. (Pl. Ex. 61). In the years after that, its sales were always far less and it always lost money. In 1968, Payne had approximately 31.5% of the retail new car market (see footnote 2, *supra*), and its percent of the market diminished in future years with the advent of the price discrimination. This critical evidence has never before been pointed out to this Court.

(3) An economist testified that the Chrysler rebate programs had caused, in fact, an injury to competition by making consumers pay a slightly higher price for cars because Payne's competitors did not have to reduce their prices below list price quite at far as they would otherwise have done had Payne not been charged a higher price from Chrysler on the cars. This hurt Payne's ability to compete in this tough market (TR. 203-204), eventually being a cause of its demise. Chrysler's re-

bate programs reduced competition in the Birmingham market between the various dealers, had an adverse effect on competition in the market (TR. 222), caused Payne not to compete as well with the other dealers as it could have done had it received the same price reduction on the cars (TR. 256-257). The rebates actually injured Payne's business by causing it to lose *profits* it would otherwise have made had the cost of the cars been the same to all of the dealers and by diminishing its ability to compete (TR. 256-258).

(4) Payne had to "over-allow" on the used car trade-ins in order to obtain new car business. This over-allowance is a form of lost profits. It also had to reduce the gross profit margin on the new cars sold in order to obtain the new car sales (TR. 65-67; 91-92; 126-127). Because of the "over-allowing" on trade-ins Payne lost money on its used car operations (TR. 97-100; 538-539; 593-599) which caused the line of credit extended by Chrysler Credit Corporation to be withdrawn and Payne ceased business. Because of the lower prices from Chrysler to Payne's competition during the rebate program, Payne lost sales to its competitors which could undersell Payne (TR. 69-70).

(5) The Dealer Financial Statements during the relevant period of 1970 through 1974 (Pl. Ex. 17-35; 61) support the fact that Payne did not pass through its higher costs to the customer in the form of a higher sales price because Payne had to "over-allow" on used car trade-ins in order to obtain business, thereby showing a loss of profits in the used car portion of the business resulting from the price discrimination. *See, e.g., Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457, 459-60 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). Chrysler's own employee, Mr. Eric Lindenberg, testified that he noticed that Payne's used car operation was the primary area where Payne lost money, compared to the other dealers (TR. 538-539). The evidence introduced to the jury clearly shows that Payne absorbed most of the higher costs suffered by the price discrimination, and thereby lost profits. Although never pointed out to this Court before, the dealers' average gross

profits of *both* the used and new car business (Def. Ex. 31; App. 54-55) show that Payne was lowest in profit margin and did not pass through the price discrimination to the ultimate customer:

AVERAGE GROSS PROFIT (NEW AND USED CARS)

Date	Payne	Hall Motor	Roebuck	Central
1971	494	676	567	499
1972	548	590	588	537
1973	543	592	625	645

Since Payne had the lowest gross profit margin because of the price discrimination, it is clear that it did not pass on its higher costs for the cars to its customers. In such a case the amount of the price discrimination is the minimum amount of damage in the form of lost profits. *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350 (E.D. Wisc. 1979); *See Enterprise Industries, Inc. v. Texas Company*, 240 F.2d 457 (2d Cir.) *cert. denied*, 353 U.S. 965 (1957).

(6) Chrysler was guilty of a substantial price discrimination against Payne in the amount of $81,248.94 (TR. 191). There was keen competition in the market (TR. 45-48) and large rebate payments to Chrysler's competitors, sometimes as much as $300 per car. (*See, e.g.*, Pl. Ex. 52, App. 51). Net profit margins were generally low on the used cars and new cars, sometimes smaller than even the amount of the price discrimination per car.

Perkins v. Standard Oil Company of California, 395 U.S. 642, 648 (1969), established the basic principle applicable to jury verdicts under § 4 of the Clayton Act. This Court held that if there is *some evidence* in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury's determination (*Id.* at 648). In *Perkins*, there was no evidence that specific lost sales were caused by the price discrimination. The evidence showed that there was substantial price discrimination, that the defendant

passed on the price advantage, at least in part, to the plaintiff's competitors, that the plaintiff's business was losing money, and that Perkins complained to Standard officials of his competitor's price advantage.

Like *Perkins* in the instant case there was evidence of substantial price discrimination which lowered the cost of Payne's competitors' cars, that Payne's business was losing money and that Payne ha lked to Chrysler officials about adjusting his quotas and "fa. share" which caused the quotas to be so high (TR. 73-74). The fact that Payne was over-allowing on used cars, was not passing through the increased price, could not meet its competitors' lower prices and that Payne's share of the market had been substantially diminished since 1968, were certainly sufficient evidence to uphold the jury's verdict finding antitrust injury.

B. *The Price Discrimination and the Market Conditions in this Case Permit a Jury to Infer Injury to Payne's Business.*

In *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972), the court held that a jury could properly infer injury under Section 4 of the Clayton Act in the following situations:

> [1] . . . a price differential that influences prices . . . (*Morton Salt Company*) . . .
>
> [2] . . . a price differential that exists in the context of keen competition and tight profit margins (*E. Edelmann Company*)
>
> [3] or a substantial and sustained price differential be-.ween competing resellers (*National Dairy Products Corp.*)

The instant case has evidence supporting all three alternatives above in addition to the direct proof of injury mentioned previously.

Under § 4 of the Clayton Act, this court should permit proof of a *prima facie* case showing the fact of injury in the amount of the price discrimination when there is evidence of a sustained and substantial price discrimination in a market of keen competition where the discrimination could affect retail prices.

There is nothing particularly evil or new in this. An even lesser burden of proof for a plaintiff exists in "attempt to monopolize" cases where the element of "dangerous probability" is inferred from specific intent and that specific intent can be inferred from proof of predatory or anti-competitive conduct which unreasonably restrains trade. *Gough v. Rossmoor Corp.*, 505 F.2d 381, 390 (9th Cir.) *cert. denied*, 440 U.S. 936 (1979); *Janich Bros., Inc. v. American Distillery Company*, 570 F.2d 848, 854 (9th Cir. 1977). Therefore, in the instant case, the jury properly inferred injury to Payne's business. The comports with the Supreme Court's holding in this case that Payne's burden of proving injury is less when Chrysler has violated the Act.

There was other supporting evidence of the fact of antitrust injury. Payne's share of the market of the new car market dropped substantially from 31.5% in 1968 to 24% in 1970; to 26.9% in 1971; to 23% in 1972; to 25% in 1973[7] During the time when Chrysler used "fair share" to determine quotas and rebates, Payne's share dropped from 27% in 1971 to 23% in 1972. Payne's sales rebounded somewhat to 25% at the end of 1973, but only because the rebate programs had been running for over two years since Vestavia Chrysler had moved into Payne's trading zone and the quotas (after January 1973, based only on prior rate of travel) were less exaggerated against Payne than they were in 1971 and 1972.

In the instant case, Payne was partially excluded from the new car sales market by virtue of the price discriminations,

---

[7]The new care sales (excluding fleet) of each of the competing dealers is shown in the following chart:

	1968	1970	1971	1972	1973
Payne	658	409	562	576	567
Vestavia		262	369	568	549
Central		521	467	585	399
Roebuck		537	688	765	753
Totals:	2089**	1729	2086	2494	2268
Payne % of Market:	31.5%**	24%	26.9%	23.1%	25%

**See, footnote 2, *supra*.

causing it to lose sales (TR. 65-67; 91-92; 94-95; 126-127). Payne also showed a loss of profits in the amount of the price discrimination since it did not pass through its increased costs to the ultmate customers. Because it did not pass on the higher prices, Payne always had the lowest gross profits even though it sold many more higher priced cars such as Imperials and Chryslers. Therefore, in this case there was ample evidence to permit a jury to find direct proof of injury or to infer injury to Payne from the price discrimination.

The Supreme Court has discussed in some detail the fact that a jury may conclude by inference that damage has occurred to an antitrust plaintiff and the limits of the burden of proof demanded of an antitrust plaintiff:

> The trial and appellates courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damaged plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; and damage issues in these cases are rarely susceptible of the kind of concrete detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact finder may 'conclude as a matter of just and reasonable *inference* from the proof of the defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.'

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 124 (1969). [Emphasis added]. *See also, Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969).

Justice Clark recognized in *Bargain Car Wash, supra,* that specific lost sales need not be proved when he cited the concurring opinion of Justice White in the case of *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143 (1968):

> It would be enough with respect to causation if the defendant "materially contributed" to plaintiff's injury . . .

> or "substantially contributed notwithstanding other factors contributed also".
>
> . . .
>
> Bargain [plaintiff] must show a causal connection between the price discrimination and the injury it suffered, but this does *not require proof of loss of specific sales.*

466 F.2d at 1174 [emphasis added].

In the instant case, the Supreme Court reversed the Fifth Circuit's former holding that damage can only be shown by proof of specific lost sales and lost profits. There would have been no need for reversal if the correct result had been reached even though an erroneous standard had first been applied by the Fifth Circuit. Thus, the Supreme Court has recognized in this case, by implication, that damage may be proved from price discrimination without a showing of specific lost sales and profits. However, the Fifth Circuit continues to look for specific proof of lost sales or profits.

In *FTC v. Morton Salt Co., supra* at 48, the Court recognized that a merchant is injured when compelled to pay a higher price than his competitors. Supreme Court has recently held that a private consumer, under § 4 of the Clayton Act, is injured in his business or property when he pays more for a product than he legally should. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Payne also showed it paid more, did not raise its resale prices, and thus was injured under § 4.

Even the Fifth Circuit has often recognized that the facts of certain price discrimination cases will support an inference of causation. *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied* 414 U.S. 1136 (1973) (private case); *Foremost Dairies, Inc. v. F.T.C.*, 348 F.2d 674 (5th Cir.), *cert. denied* 382 U.S. 959 (1966); *Bruce's Juices v. American Can Co.*, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied* 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951) (private case). In *Foremost Dairies, Inc. v. F.A.C.*, 348 F.2d 674 (5th Cir.), *cert. denied* 382 U.S. 959 (1966), the court considered whether the F.T.C. could properly infer the probability of injury to the customers

of Foremost if they did not receive certain price reductions. In that case, the evidence showed that the rebates were *not* passed through the purchaser to the ultimate consumer so as to reduce the price of the product. Even though there was no resulting price reduction to the consumer, the court held that if the rebate, which in effect was a price reduction to the purchaser, is sufficient to afford that purchaser a significant savings, and it would, if reflected in the resale price to the consumer, have a noticeable effect on the decision of the consumer to purchase, then "an inference of injury [to competition] may be properly indulged." (*Id.* at 680). The court held that it was unnecessary that there be evidence to prove that the favored customer actually undersold his competitor rivals. The substantial price advantage given by the rebates could afford the favored buyer a material capital advantage by enlarging his profit margin or enabling him to offer customer-attracting services which gave him substantial advantage over his competition. *Id.*

In *E. Edelmann and Company v. F.T.C.*, 239 F.2d 152, (7th Cir. 1956), the court held that a price differential, in the context of keen competition and tight profit margins, furnishes sufficient evidence to support a conclusion that all requirements for damage under the Robinson-Patman Act are present. In the instant case, the profit margins were very small when compared with the large rebates potentially available under the rebate programs, which sometimes amounted to several hundred dollars per car (*See* Pl. Ex. 52 and 53; App. 51-52).

Mr. Justice Jackson recognized what is patently obvious when price discrimination has occurred. He stated this principle succinctly during the argument of the *Morton Salt* case:

> A fellow who has got to pay more, has got less left – less in profit, less to carry on the business.

United States Law Week, vol. 16, no. 36, pp. 3276-77 (March 16, 1948). Even if the favored competitor did not reduce its price to the consumer, the disfavored competitor is damaged because *he loses his opportunities* to reduce his price (by the amount of the price discrimination) and undersell the favored

competitor, and maximize his profits and sales. Since Payne proved a substantial price discrimination, which it did not pass through to its customers, and which injured competition and caused it to lose its market share and diminish its profits, eventually going out of business, it has proved damage under § 4 of the Clayton Act. It need not prove by a sale by sale analysis that the favored dealers reduced their prices to the consumer because of the price favoritism.

C. *The Fifth Circuit's Decision Imposes an Unreasonably Harsh Standard of Proving the Fact of Damage and Is Contrary to the Policy of Enforcing the Antitrust Laws.*

The Supreme Court has long encouraged the private enforcement of the antitrust laws through practical and reasonable damages rules requiring only a reasonable estimate of the cause and amount of injury. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). Despite clear Congressional intent to encourage private enforcement of the Act, statistics show that it has failed woefully. From 1936 to 1961, there were 111 private cases brought, but damages entered for the plaintiff in only six. Barber, *The Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 G.W. Law Rev. 181, 191-192 (1960). Also, Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & Econ. 365, 383 (1970), wherein the number of Robinson-Patman Act private cases which have been tried and won by the plaintiff are listed for several years:

1964	170 Tried;	8 Won
1965	90 Tried;	16 Won
1966	107 Tried;	17 Won
1967	79 Tried;	13 Won
1968	79 Tried;	11 Won

This woeful failure of private enforcement of the Act will be continued if this Court permits the Fifth Circuit to substitute its judgment for that of the jury's.

IV. The Amount of Damage Was Proved to an Estimated Degree of Certainty Sufficient Under Section 4 of the Clayton Act.

A. *Since the Increase Price Was Not Passed Through, The Amount of the Price Discrimination Provides A Sufficient Estimate of the Amount of Damage in the Form of Lost Profits.*

Payne did not pass through the higher prices charged it by Chrysler as shown by the fact that Payne's profits on both new and used car sales combined were already the lowest of any of the four dealers. Undisputed testimony and the financial records of Payne established that it overallowed on used car trade-ins in order to get sales. Since Payne had the lowest gross profits because of price discrimination, it is clear that it did not pass on its higher costs for the cars to its customers. Also, unrefuted testimony shows the rebates were not passed on to the customers (TR. 85). In such a case, the amount of the price discrimination can be the amount of the damage. *Enterprise Industries v. Texas Co., supra* at 459-460; *Century Hardware Corp. v. Acme United Corp., supra.* Chrysler has heavily relied on the *Enterprise* case which held that increased cost (the price discrimination) to the purchaser is not a direct damage unless the plaintiff proves that the increased cost was absorbed, and not passed on to the customers, thus reducing profits.

Courts have held in numerous cases that, after showing an injury to the business resulting from the violation of the antitrust laws, the plaintiff has a lesser burden of proof in showing the *amount* of damage. *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264 (1946); *Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 23-24 (5th Cir. 1974), *cert. dismissed,* 49 U.S. 987 (1974). All the plaintiff must do after showing injury resulting from violation of the antitrust laws is to show "some indication of the amount of the damage done." *Larry R. George Sales Co. v. Cool Attic Corp.,* 587 F.2d 266, 270 (5th Cir. 1979). In fact, the Fifth Circuit follows the well established principle

that permits evidence that "borders on the speculative" in order to estimate damages in an antitrust case. *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 984, 904 (5th Cir. 1973).

Once the fact of damage is established, the jury should be allowed to consider the amount of price discrimination as an indication of the measure of damages. The Court permits a much more liberal rule in Sherman Act cases. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968), the Court held that, in suing under § 1 of the Sherman Act, a purchaser is injured in at least the minimum amount of the illegal overcharge. *See also Illinois Brick Co. v. Illinois*, 434 U.S. 720, 724 (1977). In both the price fixing overcharge case and the price discrimination case there is an illegal overcharge. The gravamen of the violation in both cases is that the plaintiff has been charged too much and should be compensated for the overcharge. There is no statutory basis for distinguishing between a price overcharge and price discrimination in the instant case where Payne was caused to lose a share of the market. *Hanover Shoe* should be applicable to permit a jury to *at least* consider the price discrimination as the amount of damage, even if not automatically becoming the amount of damage.

Payne proved $81,248 of price discrimination. This is in itself a minimum estimate of the amount of lost profit damages since Payne did not pass through its increased costs to the customers. To require that a plaintiff demonstrate the specific amount of lost sales or profits would require an economic analysis even more complicated than that rejected by the Court in *Hanover Shoe*. While there were only two parties involved in *Hanover Shoe*, a Robinson-Patman case normally involves numerous parties. A plaintiff in a Robinson-Patman Act case would be forced to analyze the effects of the price discrimination on (1) his own pricing decisions (2) the effect of that price discrimination on the pricing decisions of all his favored competitors, who are not even properly parties to the lawsuit, and (3) the sales and profits of everyone.

Payne is not arguing that the amount of price discrimination is under § 2 (a) of the Robinson-Patman Act gives rise to "automatic damages." The Supreme Court rejected the contention that proof of price discrimination under § 2 (a) automatically entitles the victim to damage in a minimum of that amount. But the "automatic damage" argument was a proximate cause argument, not really an amount of damage argument. The Court has not prohibited a court or jury from *considering* the amount of the price discrimination as an estimate of the damages once the violation has been found to have caused actual antitrust injury under § 4 of the Clayton Act. Once the fact of damage has been proved, the total amount of price discrimination can be a proper minimum estimate of damages since the profit in Payne's sales was reduced by the amount of the price discrimination because Payne did not pass its higher costs through to the customer.

B. *The Price Discrimination Also Caused Damage in the Amount of the Lost Going Concern Value.*

The price discrimination in the rebate programs directly caused Payne another separate category of damage redressable under the Robinson-Patman Act: the loss of the going concern value of Payne's business. Payne could not exactly measure the reduction of profits except in the minimum amount of the price discrimination. However, there is a direct measurement of the loss of the going concern value of the business. Evidence of the value of Payne ranged from $50,000 to $170.000. Clearly, this injury to Payne is exactly the type of loss and damage that the Robinson-Patman Act was designed to compensate. Substantial evidence showed the amount of that damage. Once the price discrimination was shown to have an adverse effect on competition, and on Payne's business, then that certainly permits the jury to award $111,000 in damages based on lost going concern value alone.

CONCLUSION

The Fifth Circuit took the entire case away from the jury, basically because of no proof of specific lost sales or profits. Its holding does not permit a jury to infer injury to competition and infer injury to the business of Payne. There was evidence of substantial and sustained price discrimination, keen competition in the market, tight profit margins, Payne's loss of market share compared to 1968, loss of profits by over-allowing on its used cars, and testimony from an economist that the price discrimination injured Payne in its ability to compete with other dealers and also injured competition in general because the consumer would have to pay slightly higher prices that it otherwise would have paid absent the price discrimination.

Payne is not contending that price discrimination, coupled with other corroborating evidence, *automatically* infers injury. Chrysler is free to show that the disfavored purchaser was not injured in any way by the discriminatory prices. The rule Payne seeks is to merely permit a fair decision from a jury which may infer injury from the evidence presented in this case.

This Court should reverse the Fifth Circuit and reinstate the jury verdict.

Respectfully submitted,

C. LEE REEVES

Attorney for J. Truett Payne Co.

SIROTE, PERMUTT, FRIEND, FRIEDMAN,
HELD & APOLINSKY, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35205
933-7111
Of Counsel

PROOF OF SERVICE

I, C. Lee Reeves, attorney for J. Truett Payne Company, Inc., a corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ____ day of July, 1982, I served three copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, together with three Appendices thereto, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to The Honorable J. Ross Forman, III, 1600 Bank for Savings Building, Birmingham, Alabama 35203, attorney for Chrysler Motors Corporation, a corporation.

It is further certified that all parties required to be served have been served.

This the ____ day of July, 1982.

C. Lee Reeves

Attorney for J. Truett Payne Company, Inc., Petitioner

2222 Arlington Avenue South
Birmingham, Alabama 35205
(205) 933-7111

82-212

Office - Supreme Court, U.S.
FILED
JUL 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. _____

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent

SUPPLEMENTAL APPENDIX

TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

C. Lee Reeves
2222 Arlington Avenue South
Birmingham, Alabama 35205
(205) 933-7111

Counsel for Petitioner

Of Counsel:

Sirote, Permutt, Friend, Friedman,
Held & Apolinsky, P.A.
2222 Arlington Avenue South
Birmingham, Alabama 35205
(205) 933-7111

July 23, 1982

TABLE OF CONTENTS

Page

Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575 (5th Cir. 1982) A-1

Rehearing Denied in J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 677 F.2d 117 (5th Cir. 1982) (en banc) A-16

CHRYSLER CREDIT CORPORATION,
a corporation,
Plaintiff,

v.

J. TRUETT PAYNE COMPANY, INC., etc., et al.,
Defendants-Third Party Plaintiffs-Appellees,

v.

CHRYSLER MOTORS CORPORATION,
a corporation,
Third Party Defendant
Additional Party Defendant-Appellant.

No. 77-2331

United States Court of Appeals,
Fifth Circuit.*

March 19, 1982.

Appeal from the United States District Court for the Northern District of Alabama.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before GODBOLD, Chief Judge, RONEY and FRANK M. JOHNSON, Jr., Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

This is an appeal from a treble damages judgment in favor of third party plaintiff J. Truett Payne Company against third party defendant Chrysler Motors Corporation for unlawful price discrimination. Payne alleged that it was entitled to recover damages under Section 4 of the

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Clayton Act because Chrysler had violated Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C.A. §§ 13 (a), 15.[1]

In an earlier opinion we reversed the judgment and ordered the district court to enter judgment for Chrysler. *Chrysler Credit Corp. v. J. Truett Payne Inc.*, 607 F.2d 1133 (5th Cir. 1979). On appeal from our ruling, the United States Supreme Court vacated the order and remanded the case for further proceedings. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981).

J. Truett Payne Company alleged that, as a result of certain discriminatory sales incentive programs conducted by Chrysler Motors among its dealerships in the Birmingham area, it had been forced to pay higher prices for Chrysler automobiles than had its competitors. Payne claimed that because of the higher prices it lost sales and profits and was eventually forced out of business. In our initial review of

---

[1]Section 4 of the Clayton Act, 15 U.S.C.A. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 2 (a) of the Robinson-Patman Act, 15 U.S.C.A. § 13 (a), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them. . . .

the case we found it unnecessary to consider whether Payne proved that Chrysler violated the Robinson-Patman Act because we determined that Payne failed to introduce substantial evidence of injury attributable to Chrysler's alleged price discrimination, much less substantial evidence as to the amount of the alleged damages. We held that the district court erred in denying Chrysler's motion for directed verdict and motion for judgment notwithstanding the verdict.

We recognized that price discrimination which threatens competition but which has not caused any actual competitive injury may be held to violate Section 2 (a) even though it will not support an action for damages. 607 F.2d at 1137; *see, e.g., M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1066 (5th Cir. 1975), *cert. denied*, 424 U.S. 968, 96 S.Ct. 1466, 47 L.Ed.2d 736 (1976); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L. Rev. 1127 (1976). We stated that "Even assuming that [we could infer a violation from the fact of the price differentials alleged] it is of no help to Payne. In order to recover damages, Payne had to show more than just a threat of antitrust injury." *Id.* We concluded that the unsupported testimony of injury and damages from the plaintiff's owner, J. Truett Payne, and the conclusory statements to the same effect by the plaintiff's expert witness were insufficient to allow the case to go to the jury under the standard for directed verdict and judgment notwithstanding the verdict announced in *Boeing Co. v. Shipman*, 411 F.2d 365, 373-77 (5th Cir. 1969) (en banc). Relying on the Supreme Court's holding in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (damages may not be presumed from the mere violation of § 7 of the Clayton Act), we declined to follow the "automatic damages" concept suggested by other courts.

607 F.2d at 1136. *See, e.g., Fowler Manufacturing Co. v. Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d 503 (1970). In addition we concluded that even under the less severe burden for proving damages in an antitrust action as announced in *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946), and *Story Parchment Co. v. Paterson Parchment Co.,* 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931), the plaintiff's "showing was clearly not such as to allow the case to go to the jury." 607 F.2d at 1137.

In its review of this case the Supreme Court agreed that the jury should not be permitted to infer "the requisite injury and damage from a showing of substantial price discrimination." 451 U.S. 557, 101 S.Ct. 1923, at 1927, 68 L.Ed.2d 442. The Court also rejected the plaintiff's claim for "automatic damages" on the basis of its holding in *Brunswick v. Pueblo Bowl-O-Mat, supra.* "To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. . . . It must prove more than a violation of § 2(a), since such proof establishes only that injury *may* result." 451 U.S. at 562, 101 S.Ct. at 1927. In discussing the lenient damages rules developed for antitrust recovery, the Court characterized the plaintiff's evidence as "weak" even under the relaxed standard. *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969); *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 377-79, 47 S.Ct. 400, 404-05, 71 L.Ed. 684 (1927); *Story Parchment Co. v. Paterson Parchment Co.,* 282 U.S. 555, 561-66, 51 S.Ct. 248, 250-52, 75 L.Ed. 544 (1931). More fundamentally, however,

the Court found that the cases relied upon by the plaintiff "all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof." 451 U.S. at 568, 101 S.Ct. at 1930. As a result the majority of the Court declined to apply this standard, absent a determination by this Court that the plaintiff had in fact made out a sufficient Section 2(a) violation by the defendant. The Supreme Court determined that "the proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence adduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act. . . . If the court determines on remand that respondent did violate the Act, the court should then consider the sufficiency of petitioner's evidence of injury in light of the cases discussed above." *Id.*

Upon remand we directed the parties to file supplemental briefs containing specific references to the evidence in the record. After reviewing the proceedings, the record, and the arguments of the parties we conclude that plaintiff J. Truett Payne Company did not introduce sufficient evidence of either violation, injury, or damages to withstand the defendant's motions.

I. Payne's Price Discrimination Allegations.

From January 1970 through August 1974, the period at issue, Chrysler Motors Corporation was a wholly owned subsidiary of Chrysler Corporation, engaged in wholesaling Chrysler-Plymouth automobiles to retail dealerships throughout the country. J. Truett Payne Company, Inc., was one of four Chrysler dealerships in the Birmingham, Alabama, area.[3]

[3]Payne went out of business in May 1974. In September 1974 Chrysler Credit Corporation filed suit for the recovery of certain unrepaid loans.

From December 1970 through May 1974 Chrysler offered nineteen sales incentive programs to its Birmingham dealers. The incentive programs were identical in design to programs offered to all other Chrysler dealers in the United States, and similar to programs offered by other automobile manufacturers. The programs were of two basic types — "straight retail" and "wholesale-retail." Under the straight retail programs dealers were paid a bonus for sales in excess of a retail sales objective, set by Chrysler on the basis of the dealer's own sales during a prior period in which market conditions were similar. Under the wholesale-retail programs each dealer had to purchase a specific stock of automobiles in order to participate. After the dealer purchased the requisite number, it was paid a bonus for every car sold out of the qualifying stock. The amount of the bonuses depended on the number of retail sales, or wholesale purchases, in excess of the dealer's objective.

The purpose of these programs was to stimulate sales of Chrysler and Plymouth automobiles. Chrysler clearly sought to give each dealer a greater incentive to sell more cars. So that each dealer could participate on reasonably equivalent terms Chrysler attempted to set the objectives according to each dealer's own purchase and sales capacity. Under the straight retail programs Chrysler encouraged dealers to meet or exceed their prior sales performance. Under the wholesale-retail programs Chrysler encouraged dealers to stock sufficient inventory in order to attract purchasers, and to a lesser degree to allow Chrysler to maintain an efficient production schedule. Chrysler divided purchase objectives among its dealers under the wholesale-retail programs by factoring in each dealer's relative sales per-

---

Part of Payne's response was the filing of this price discrimination suit against Chrysler Motors. The district court severed trial of the price discrimination suit from trial of the Chrysler Credit issues.

formance along with the market strength of each dealer's location. Because Payne was the long-time dominant dealer in the Birmingham area, its quotas were usually higher under both types of programs.

To the extent that Payne failed to meet a number of its objectives, and other dealers were able to meet theirs, Payne received relatively fewer bonuses. Over the relevant period of the suit, no dealer remained the consistent top performer; Payne itself was the highest performer in a number of the bonus programs during the period. In the thirteen programs of which Payne complained, however, the difference in bonus payments between Payne and the highest dealer in each program totaled $81,248. Payne alleged that this disparity in bonus payments constituted price discrimination which substantially lessened competition in the Birmingham area. Payne claimed that because of the higher prices it lost sales and profits, and was eventually forced out of business. In defense, Chrysler maintained that the sales incentive programs were available to all the Birmingham dealers on a nondiscriminatory basis and denied that they had any adverse effect on competition or that they injured Payne.

Testimony was taken for six days. Chrysler's motions for a directed verdict made at the close of Payne's case and at the close of all evidence were denied. The jury reached a verdict and awarded Payne $111,247.48, which the court trebled.[3] Chrysler's motion for judgment notwithstanding the verdict or for a new trial was denied and Chrysler appealed.

---

[3]Payne asked for $180,000, claiming that the alleged price discrimination amounted to $81,248 and that the going concern value of the business as of May 1974 ranged between $50,000 and $170,000.

II. The Alleged Violation of the Robinson-Patman Act.

[1] It is well established that, in order to recover treble damages under Section 4 of the Clayton Act, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of the damage. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 852 (5th Cir. 1981); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 694 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed. 2d 260 (1974). The antitrust violation alleged in this case was unlawful price discrimination affecting secondary line competition, that is, price discrimination by the seller which affects competition among its buyers. *See International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 720 n.11 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). In the context of secondary line competition, Section 2(a) prohibits price discrimination between different purchasers of commodities of like grade and quality "where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition" among the purchasers. 15 U.S.C.A. § 13(a); *International Air Industries, Inc. v. American Excelsior Co., supra*, 517 F.2d at 720-21.

[2] The reasonable possibility of substantially lessening competition has been interpreted in this Circuit as requiring the plaintiff to prove that the result of the price discrimination "is likely to be a severe, adverse effect on competition." *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1144

(5th Cir. 1973) (en banc); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 36-37 (5th Cir.), *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972). In order to show a violation of Section 2(a) of the Robinson-Patman Act a plaintiff must demonstrate that the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him, the disfavored competitor. *See Littlejohn v. Shell Oil Co., supra; Enterprise Industries v. Texas Co.*, 240 F.2d 457, 458 (2d Cir.), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957).

Courts must be careful in each case to distinguish between price differences which cause anticompetitive effects and those which reflect "a desirable response to competition and considerations of efficiency." Cooper, *Price Discrimination Law and Economic Efficiency*, 75 Mich.L.Rev. 962, 969 (1977). As the Supreme Court stated in *FTC v. Sun Oil Co.*, 371 U.S. 505, 527, 83 S.Ct. 358, 370-71, 9 L.Ed.2d 466 (1963), "In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." Evaluation of pricing systems must be made in light of the broad purposes of the Robinson-Patman Act and the antitrust laws. That purpose is to encourage competition among buyers and sellers. *See Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 99 S.Ct. 925, 59 U.Ed.2d 153 (1979). This Court has stated that "our goal in applying the Robinson-Patman Act is to maintain active competition—including price rivalry—among the members of the business community." *International Air Industries, Inc., supra*, 517 F.2d at 721.

Our review must necessarily focus on the evidence presented in this case. To avoid a directed verdict or judgment notwithstanding the verdict in a price discrimination case, the plaintiff "must have presented sufficient evidence to create a jury question with respect to each element of his case." *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 848 (5th Cir. 1981). The plaintiff must introduce what this Court has defined as "substantial evidence to create a jury question." *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc). This Court recently reaffirmed the *Boeing* standard in *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir. 1982) (en banc). Substantial evidence is "evidence of such quality and weight that reasonable and fairminded persons in the exercise of impartial judgment might reach different conclusions." *Maxey v. Freightliner Corp.*, 665 F.2d 1367, at 1371. Viewing all the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion," there must be a "conflict in substantial evidence" in order to create a jury question. *Id.* at 1371.

[3] When we turn to the plaintiff's evidence we find it inadequate in several areas, the first of which concerns whether the incentive programs were likely to lessen competition substantially among the Chrysler-Plymouth dealers or prevent Payne from competing. *See International Air Industries, Inc. v. American Excelsior Co., supra; Borden Co. v. FTC*, 381 F.2d 175, 178-81 (5th Cir. 1967). While the plaintiff presented a good deal of evidence on the mechanics of these programs, *i.e.*, how the dealers qualified for bonuses, there was very little evidence linking the programs to competition among the Birmingham dealers. The unsupported testimony of the plaintiff's witnesses spoke to either the supposed or the hypothesized effect of the programs and was in conflict even on that level. Mr. J. Truett

Payne testified on the one hand that customers and salesmen had told him that the dealership was being undersold and that some salesmen had quit. Payne's expert witness, on the other hand, testified that the effect of the programs was not to undersell Payne, but rather to keep the price level artificially high. Neither witness, however, testified from the basis of actual sales experience or comparative sales pricing. Payne's unsupported testimony was on the basis of second hand statements repeated to him, while the expert testified from the perspective of general market theory.

The speculative and unsupported testimony in this case was legally insufficient to support a finding of unlawful price discrimination. The only documentary evidence the plaintiff presented to support its claim of lost sales was that its market share declined by 4% temporarily in 1972. There was no substantial evidence that the Chrysler incentive programs were the cause of this decline. Over the four year period of the challenged programs, Payne's market share actually increased by 1%.

In evaluating the degree of likely impact on competitive strength, we cannot ignore the actual competitive facts of the case. *See FTC v. Sun Oil, supra.* Mr. J. Truett Payne himself testified that the primary reason that some of the other dealers were able to grow during this period was that they had either opened new facilities or were located in the areas of town that were experiencing population growth. In addition, Payne testified that the main reason his used car business declined and substantially contributed to his business failure was that he was not able to get used car financing and was forced to wholesale his used cars. Furthermore, the defendant introduced testimony that the plaintiff had forsaken the new car market to some extent to pursue fleet sales and had made substantial sales in that

area. Finally, the plaintiff did not dispute the testimony that the average difference in bonus payments over the relevant period of competition amounted to only $11.00 per car between the best performing dealer and the worst one, with Payne in third place.

The plaintiff's relianve on *FTC v. Morton Salt*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), and its progeny is not relevant to the facts of this case. *Morton Salt* upheld an inference of likely injury from the fact of substantial price differences granted to market leaders in a highly competitive market in which minor price differences significantly affected competitors' low profit margins. The plaintiff's evidence established hardly any of these elements. We conclude that there was not a conflict in substantial evidence and that Chrysler was entitled to a directed verdict.

III. Cognizable Injury.

[4, 5] In a treble damages suit under the Robinson-Patman Act a plaintiff must not only prove a violation of the Act, he must also demonstrate antitrust injury by a preponderance of the evidence. *See Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969); *Zenith Radio, supra.* In addition, he must do so "as a matter of fact and with a fair degree of certainty." *Terrell v. Household Goods Carriers' Bureau, supra,* 494 F.2d at 20. Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation are not sufficient. Evidence of a slight decrease in market share roughly coincident with the alleged violation is not sufficient either. The plaintiff must put forth substantial evidence. If he fails to do so, the defendant is entitled to a directed verdict. *See, e.g., Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1378, 1383 (5th Cir. 1979); *Yoder Brothers, Inc. v. California-*

Florida Plant Corp., 537 F.2d 1347, 1371 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977); *Foremost-McKesson v. Instrumentation Laboratory*, 527 F.2d 417, 418-20 (5th Cir. 1976); *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 153 (5th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975). Only when the plaintiff has demonstrated the fact of injury may the court be lenient in the amount of evidence required to prove damages. *See Story Parchment Co., supra*, 282 U.S. at 562, 51 S.Ct. at 250 (1931). The plaintiff's evidence, as we have discussed, was not substantial as to either the likely or actual injury attributable to the Chrysler programs. As a result Chrysler was entitled to a directed verdict on this issue as well.

IV. Damages.

[6] Payne relied on its calculation of the alleged price discrimination to establish the amount of its alleged lost sales and profits. To indicate the going concern value of the dealership at the time it was allegedly forced out of business, Payne relied on two alternative methods of calculation. Under the first, Payne's expert assumed a good will value for the dealership of $52,000 in 1955 and appreciated this amount over 20 years at an annual rate of 4%. The expert testified that the $52,000 figure was not based on an examination of Payne's financial statements. It represented an unsupported estimate by Mr. Payne. The 4% rate was a rough average of the prevailing inflation and prime interest rates from 1955 until the time Payne folded. Under the second method, Payne's expert discounted projections of what the dealership's profits would have been if it had continued in business free of the incentive programs. The expert testified that he did not take into account local market changes or conditions. The projections were apparently

nothing more than some of Payne's past earnings roughly adjusted according to Chrysler's performance nationwide or the performance of the automobile industry in general. If Chrysler or the industry had a good year it was assumed, without an explanation why, that Payne would have a good year also.

As was the case with Payne's evidence to support antitrust violation and injury, this evidence was clearly not such as to allow the case to go to the jury. Price difference without more does not indicate the amount of lost sales or profits. Self-serving and unsupported assumptions cannot sustain a calculation of going concern value. The burden of putting forth substantial evidence is not satisfied by mere speculation and guess work. *See, e.g., Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir. 1979).

Even though the burden of proving damages is lessened by the fact of antitrust violation and injury, the plaintiff is still required to put forth substantial relevant evidence. See *Story Parchment, supra*. As the Supreme Court pointed out, the policy behind the lenient damages rules is that it would be inequitable to allow a wrongdoer to protect his illegal acts by insisting that the plaintiff meet a rigorous standard in calculating damages. *J. Truett Payne Co., supra*. Even if we held that Payne had presented substantial evidence of violation and injury and could invoke the standard of lenity, we would nonetheless conclude that Payne's evidence was insufficient. As we indicated, Payne relied on nothing more than the mere fact of alleged price difference and the hypothesized effect of the difference on its business. In calculating the going concern value, the plaintiff's expert failed to document his basic assumptions or to consider local market conditions. *See Lehrman v.*

Gulf Oil Corp., 500 F.2d 659, 667-68 (5th Cir. 1974). On this ground as well Chrysler was entitled to a directed verdict. *See, e.g., Kestenbaum v. Falstaff Brewing Corp., supra,* 514 F.2d at 695; *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 953-55 (5th Cir. 1975).

The district court is directed to enter judgment for Chrysler.

REVERSED AND REMANDED WITH DIRECTIONS.

UNITED STATES COURT OF APPEALS

Eleventh Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
• • •			
J. Truett Payne Co., Inc. v. Chrysler Motors Corp.	77-2331	4/26/82	N.D.Ala., 670 F.2d 575
• • •			

PROOF OF SERVICE

I, C. Lee Reeves, attorney for J. Truett Payne Company, Inc., a corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 5th day of August, 1982, I served three copies of the Supplemental Appendix, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope to the Honorable J. Ross Forman, III, 1600 Bank for Savings Building, Birmingham, Alabama 35203, attorney for Chrysler Motors Corporation, a corporation.

It is further certified that all parties required to be served have been served.

This the 5th day of August, 1982.

C. LEE REEVES
Attorney for J. Truett Payne Company, Inc., Petitioner
2222 Arlington Avenue South
Birmingham, Alabama 35205
(205) 933-7111

82-212

Office - Supreme Court.
FILED
JUL 26 1982
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. _____

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

C. Lee Reeves
2222 Arlington Avenue South
Birmingham, Alabama 35205
(205) 933-7111

Counsel for Petitioner

Of Counsel:

Sirote, Permutt, Friend, Friedman,
Held & Apolinsky, P.A.
2222 Arlington Avenue South
Birmingham, Alabama 35205
(205) 933-7111

July 23, 1982

TABLE OF CONTENTS

	Page
Abbreviations	iii
Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575 (5th Cir. 1982)	1
Rehearing Denied in J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 677 F.2d 117 (1982) (en banc)	10
J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981)	11
Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 607 F.2d 1133 (5th Cir. 1980)	25
Denial of Rehearing of J. Truett Payne, Inc. v. Chrysler Motors Corp., 614 F.2d 1298-1299 (1980)	34-35
Plaintiff's Exhibit 37	36
Plaintiff's Exhibit 38	37
Plaintiff's Exhibit 39	38
Plaintiff's Exhibit 40	39
Plaintiff's Exhibit 41	40
Plaintiff's Exhibit 42	41
Plaintiff's Exhibit 43	42
Plaintiff's Exhibit 44	43
Plaintiff's Exhibit 45	44
Plaintiff's Exhibit 46	45
Plaintiff's Exhibit 47	46

TABLE OF CONTENTS (CONT'D)

	Page
Plaintiff's Exhibit 48	47
Plaintiff's Exhibit 49	48
Plaintiff's Exhibit 50	49
Plaintiff's Exhibit 51	50
Plaintiff's Exhibit 52	51
Plaintiff's Exhibit 53	52
Plaintiff's Exhibit 54	53
Defendant's Exhibit 31	54-55
Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act: 15 U.S.C. § 13	56
Section 4 of the Clayton Act, 15 U.S.C. § 15	57

Excerpts from TRANSCRIPT of the Evidences

Witnesses: J. Truett Payne	58-142; 215-217
George Ignatin	143-213; 214-215

INTRODUCTION

The abbreviation used throughout the Charts, pages 10 through 27, are set forth below:

C/L	- Car Line
CEN.	- Central Motors
Diff. and Difference	- Price Differential to J. Truett Payne
El.	- Eligible
JTP	- J. Truett Payne
Obj.	- Objective
P.U.	- Per Unit
Pur.	- Purchase
Reb.	- Rebate
ROE.	- Roebuck Chrysler-Plymouth
VEST.	- Vestavia Chrysler-Plymouth
W/S	- Wholesale

commanding what no one can obey, or it imposes an obligation on the Corps beyond the monetary limits permitted by the statute. Whether this is a fatal defect, we cannot determine. It is a sufficient reason, however, to deny summary judgment in favor of the Corps.

Whether Section 404 of the Clean Water Act, 33 U.S.C. § 1344, prohibits completion of the project may be an issue for the trial court on remand.[16] Whether either the EPA or Jefferson Parish or both are indispensable or proper parties are questions not yet posed. The applicability of the Clean Water Act cannot be determined collaterally and prematurely on a motion for summary judgment in an action in which the EPA has not even had a chance to be heard. Both for these reasons and for the other reasons already given, we must reject the landowners' demand for a summary judgment.

At this time, we cannot determine from the record before us, made up for summary judgment purposes, whether further proceedings in the district court would be appropriate or whether it is necessary to remand the case to the Corps to supplement the record and to determine whether the EPA will exercise its veto authority. In their haste to score a complete and early victory, the parties have presented summary judgment motions and raised and briefed only the issues immediately apparent. All that we can now decide is that summary judgment in favor of the landowners was properly denied and that summary judgment in favor of the Corps was not supported by the record. We, therefore, REVERSE the summary judgment in favor of the Corps, and REMAND for further proceedings consistent with this opinion.

16. *See generally* Blumm, The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective, 8 Ecology L.Q. 403, 411 (1980) ("the first five years of the program were largely devoted to defining and debating its scope of authority rather than ensuring its effective implementation"); Caplin, Is Congress Protecting Our Water? The Controversy over Section 404, Federal Water Pollution Control Act Amendments of 1972, 31 U.Miami L.Rev. 445 (1977); Note, Federal Control of Wetlands: The Effectiveness of Corps' Regulations Under § 404 of the FWPCA, 51 Notre Dame Law. 505 (1976).

CHRYSLER CREDIT CORPORATION, A Corporation, Plaintiff,

v.

J. TRUETT PAYNE COMPANY, INC., etc., et al., Defendants-Third Party Plaintiffs-Appellees,

CHRYSLER MOTORS CORPORATION, A Corporation, Third Party Defendant Additional Party Defendant-Appellant.

No. 77-2331

United States Court of Appeals, Fifth Circuit.*

March 19, 1982.

The United States District Court for the Northern District of Alabama, Seybourn H. Lynne, J., entered judgment in automobile dealer's Robinson-Patman Act action against automobile manufacturer, and appeal was taken. The Court of Appeals, 607 F.2d 1123, reversed and ordered judgment to be entered for defendant manufacturer, and appeal was again taken. The United States Supreme Court, 451 U.S. 557, 101 S.Ct. 1923, 68 L.Ed.2d 442, vacated and remanded. On remand, the Court of Appeals, Frank M. Johnson, Jr., Circuit Judge, held that: (1) absent showing that manufacturer's dealership incentive programs were likely to lessen competition substantially among local dealers or to prevent plaintiff dealer from competing, manufacturer was not liable under Robinson-Patman Act for alleged price discrimination arising from the incentive programs; (2)

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

absent showing of either likely or actual injury attributable to manufacturer's dealer incentive programs, plaintiff dealer could not be entitled to recover for alleged violation of Robinson-Patman Act; and (3) plaintiff dealer's reliance upon mere fact of alleged price difference caused by manufacturer's dealer incentive programs and upon hypothesized effect of such difference on its business was insufficient to establish damages.

Reversed and remanded with directions.

1. Monopolies ⇐28(9)

In order to recover treble damages under Section 4 of Clayton Act, plaintiff must prove violation of antitrust laws, cognizable injury attributable to the violation, and at least approximate amount of damage. Clayton Act, § 4, 15 U.S.C.A. § 15.

2. Trade Regulation ⇐913

In order to show violation of price discrimination section of Robinson-Patman Act, plaintiff must demonstrate that likely effect of alleged price discrimination was to allow favored competitor to draw significant sales or profits away from him, the disfavored competitor. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

3. Trade Regulation ⇐915

Absent showing that automobile manufacturer's dealership incentive programs were likely to lessen competition substantially among local dealers or to prevent plaintiff dealer from competing, manufacturer was not liable under Robinson-Patman Act for alleged price discrimination arising from the incentive programs. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, and § 4, 15 U.S.C.A. §§ 13(a), 15.

4. Trade Regulation ⇐929

In treble damages suit under Robinson-Patman Act, plaintiff must not only prove violation of the Act, he must also demonstrate antitrust injury by preponderance of evidence; conclusory statements by plaintiff, without evidentiary support, as to fact of damage caused by antitrust violation, are not sufficient, and evidence of slight decrease in market share roughly coincident with alleged violation is not sufficient either. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

5. Trade Regulation ⇐915

Absent showing of either likely or actual injury attributable to automobile manufacturer's dealer incentive programs, plaintiff dealer could not be entitled to recover for alleged violation of Robinson-Patman Act resulting from such incentive programs. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, and § 4, 15 U.S.C.A. §§ 13(a), 15.

6. Trade Regulation ⇐929

Plaintiff dealer's reliance upon mere fact of alleged price difference caused by automobile manufacturer's dealer incentive programs and upon hypothesized effect of such difference on its business was insufficient to establish, for purposes of Robinson-Patman Act price discrimination claim, damages allegedly arising from manufacturer's use of the incentive programs. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, and § 4, 15 U.S.C.A. §§ 13(a), 15.

J. Ross Forman, III, J. Fredric Ingram, Birmingham, Ala., for third-party defendant-additional party defendant-appellant.

C. Lee Reeves, Birmingham, Ala., for defendants-third party plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of Alabama.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before GODBOLD, Chief Judge, RONEY and FRANK M. JOHNSON, Jr., Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

This is an appeal from a treble damages judgment in favor of third party plaintiff J. Truett Payne Company against third party defendant Chrysler Motors Corporation for unlawful price discrimination. Payne alleged that it was entitled to recover damages under Section 4 of the Clayton Act because Chrysler had violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C.A §§ 13(a), 15.[1]

In an earlier opinion we reversed the judgment and ordered the district court to enter judgment for Chrysler. *Chrysler Credit Corp. v. J. Truett Payne Inc.*, 607 F.2d 1138 (5th Cir. 1979). On appeal from our ruling, the United States Supreme Court vacated the order and remanded the case for further proceedings. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981).

J. Truett Payne Company alleged that, as a result of certain discriminatory sales incentive programs conducted by Chrysler Motors among its dealerships in the Birmingham area, it had been forced to pay higher prices for Chrysler automobiles than had its competitors. Payne claimed that because of the higher prices it lost sales and profits and was eventually forced out of business. In our initial review of the case we found it unnecessary to consider whether Payne proved that Chrysler violated the Robinson-Patman Act because we determined that Payne failed to introduce substantial evidence of injury attributable to Chrysler's alleged price discrimination, much less substantial evidence as to the amount of the alleged damages. We held that the district court erred in denying Chrysler's motion for directed verdict and motion for judgment notwithstanding the verdict.

We recognized that price discrimination which threatens competition but which has not caused any actual competitive injury may be held to violate Section 2(a) even though it will not support an action for damages. 607 F.2d at 1137; *see, e.g., M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1068, 1086 (5th Cir. 1975), *cert. denied*, 424 U.S. 968, 96 S.Ct. 1466, 47 L.Ed.2d 736 (1976); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L.Rev. 1127 (1976). We stated that "Even assuming that [we could infer a violation from the fact of the price differentials alleged] it is of no help to Payne. In order to recover damages, Payne had to show more than just a threat of antitrust injury." *Id.* We concluded that the unsupported testimony of injury and damages from the plaintiff's owner, J. Truett Payne, and the conclusory statements to the same effect by the plaintiff's expert witness were insufficient to allow the case to go to the jury under the standard for directed verdict and judgment notwithstanding the verdict announced in *Boeing Co. v. Shipman*, 411 F.2d 365, 373–77 (5th Cir. 1969) (en banc). Relying on the Supreme Court's holding in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50

1. Section 4 of the Clayton Act, 15 U.S.C.A. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C.A. § 13(a), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them . . .

L.Ed.2d 701 (1977) (damages may not be presumed from the mere violation of § 7 of the Clayton Act), we declined to follow the "automatic damages" concept suggested by other courts. 607 F.2d at 1186. *See, e.g., Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d 503 (1970). In addition we concluded that even under the less severe burden for proving damages in an antitrust action as announced in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946), and *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931), the plaintiff's "showing was clearly not such as to allow the case to go to the jury." 607 F.2d at 1187.

In its review of this case the Supreme Court agreed that the jury should not be permitted to infer "the requisite injury and damage from a showing of substantial price discrimination." 451 U.S. 557, 101 S.Ct. 1923, at 1927, 68 L.Ed.2d 442. The Court also rejected the plaintiff's claim for "automatic damages" on the basis of its holding in *Brunswick v. Pueblo Bowl-O-Mat, supra*. "To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. . . . It must prove more than a violation of § 2(a), since such proof establishes only that injury *may* result." 451 U.S. at 562, 101 S.Ct. at 1927. In discussing the lenient damages rules developed for antitrust recovery, the Court characterized the plaintiff's evidence as "weak" even under the relaxed standard. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123–24, 89 S.Ct. 1562, 1576–77, 23 L.Ed.2d 129 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377–79, 47 S.Ct. 400, 404–05, 71 L.Ed. 684 (1927); *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 561–65, 51 S.Ct. 248, 250–52, 75 L.Ed. 544 (1931). More fundamentally, however, the Court found that the cases relied upon by the plaintiff "all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof." 451 U.S. at 563, 101 S.Ct. at 1930. As a result the majority of the Court declined to apply this standard, absent a determination by this Court that the plaintiff had in fact made out a sufficient Section 2(a) violation by the defendant. The Supreme Court determined that "the proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence adduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act. . . . If the court determines on remand that respondent did violate the Act, the court should then consider the sufficiency of petitioner's evidence of injury in light of the cases discussed above." *Id.*

Upon remand we directed the parties to file supplemental briefs containing specific references to the evidence in the record. After reviewing the proceedings, the record, and the arguments of the parties we conclude that plaintiff J. Truett Payne Company did not introduce sufficient evidence of either violation, injury, or damages to withstand the defendant's motions.

I. Payne's Price Discrimination Allegations.

From January 1970 through August 1974, the period at issue, Chrysler Motors Corporation was a wholly owned subsidiary of Chrysler Corporation, engaged in wholesaling Chrysler-Plymouth automobiles to retail dealerships throughout the country. J. Truett Payne Company, Inc., was one of four Chrysler dealerships in the Birmingham, Alabama, area.[2]

2. Payne went out of business in May 1974. In September 1974 Chrysler Credit Corporation filed suit for the recovery of certain unrepaid loans. Part of Payne's response was the filing of this price discrimination suit against Chrysler Motors. The district court severed trial of the price discrimination suit from trial of the Chrysler Credit issues.

From December 1970 through May 1974 Chrysler offered nineteen sales incentive programs to its Birmingham dealers. The incentive programs were identical in design to programs offered to all other Chrysler dealers in the United States, and similar to programs offered by other automobile manufacturers. The programs were of two basic types—"straight retail" and "wholesale-retail." Under the straight retail programs dealers were paid a bonus for sales in excess of a retail sales objective, set by Chrysler on the basis of the dealer's own sales during a prior period in which market conditions were similar. Under the wholesale-retail programs each dealer had to purchase a specific stock of automobiles in order to participate. After the dealer purchased the requisite number, it was paid a bonus for every car sold out of the qualifying stock. The amount of the bonuses depended on the number of retail sales, or wholesale purchases, in excess of the dealer's objective.

The purpose of these programs was to stimulate sales of Chrysler and Plymouth automobiles. Chrysler clearly sought to give each dealer a greater incentive to sell more cars. So that each dealer could participate on reasonably equivalent terms Chrysler attempted to set the objectives according to ea dealer's own purchase and sales capacity. Under the straight retail programs Chrysler encouraged dealers to meet or exceed their prior sales performance. Under the wholesale-retail programs Chrysler encouraged dealers to stock sufficient inventory in order to attract purchasers, and to a lesser degree to allow Chrysler to maintain an efficient production schedule. Chrysler divided purchase objectives among its dealers under the wholesale-retail programs by factoring in each dealer's relative sales performance along with the market strength of each dealer's location. Because Payne was the long-time dominant dealer in the Birmingham area, its quotas were usually higher under both types of programs.

To the extent that Payne failed to meet a number of its objectives, and other dealers were able to meet theirs, Payne received relatively fewer bonuses. Over the relevant period of the suit, no dealer remained the consistent top performer; Payne itself was the highest performer in a number of the bonus programs during the period. In the thirteen programs of which Payne complained, however, the difference in bonus payments between Payne and the highest dealer in each program totaled $81,248. Payne alleged that this disparity in bonus payments constituted price discrimination which substantially lessened competition in the Birmingham area. Payne claimed that because of the higher prices it lost sales and profits, and was eventually forced out of business. In defense, Chrysler maintained that the sales incentive programs were available to all the Birmingham dealers on a nondiscriminatory basis and denied that they had any adverse effect on competition or that they injured Payne.

Testimony was taken for six days. Chrysler's motions for a directed verdict made at the close of Payne's case and at the close of all evidence were denied. The jury reached a verdict and awarded Payne $111,247.48, which the court trebled.[3] Chrysler's motion for judgment notwithstanding the verdict or for a new trial was denied and Chrysler appealed.

II. *The Alleged Violation of the Robinson-Patman Act.*

[1] It is well established that, in order to recover treble damages under Section 4 of the Clayton Act, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of the damage. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 852 (5th Cir. 1981); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 694 (5th Cir. 1975), cert.

3. Payne asked for $180,000, claiming that the alleged price discrimination amounted to $81,248 and that the going concern value of the business as of May 1974 ranged between $50,000 and $170,000

denied, 434 U.S. 843, 98 S.Ct. 1412, 47 L.Ed.2d 388 (1976); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), cert. dismissed, 419 U.S. 987, 95 S.Ct. 248, 42 L.Ed.2d 200 (1974). The antitrust violation alleged in this case was unlawful price discrimination affecting secondary line competition, that is, price discrimination by the seller which affects competition among its buyers. *See International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 720 n.11 (5th Cir. 1975), cert. denied, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). In the context of secondary line competition, Section 2(a) prohibits price discrimination between different purchasers of commodities of like grade and quality "where the effect of such discrimination may be substantially to lessen competition ... or to injure, destroy, or prevent competition" among the purchasers. 15 U.S.C.A. § 13(a); *International Air Industries, Inc. v. American Excelsior Co.*, *supra*, 517 F.2d at 720–21.

[2] The reasonable possibility of substantially lessening competition has been interpreted in this Circuit as requiring the plaintiff to prove that the result of the price discrimination "is likely to be a severe, adverse effect on competition." *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1144 (5th Cir. 1973) (en banc); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 36–37 (5th Cir.), cert. denied, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972). In order to show a violation of Section 2(a) of the Robinson-Patman Act a plaintiff must demonstrate that the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him, the disfavored competitor. *See Littlejohn v. Shell Oil Co.*, *supra*; *Enterprise Industries v. Texas Co.*, 240 F.2d 457, 458 (2d Cir.), cert. denied, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957).

Courts must be careful in each case to distinguish between price differences which cause anticompetitive effects and those which reflect "a desirable response to competition and considerations of efficiency." Cooper, *Price Discrimination Law and Economic Efficiency*, 75 Mich.L.Rev. 962, 969 (1977). As the Supreme Court stated in *FTC v. Sun Oil Co.*, 371 U.S. 505, 527, 83 S.Ct. 358, 370–71, 9 L.Ed.2d 466 (1963), "In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." Evaluation of pricing systems must be made in light of the broad purposes of the Robinson-Patman Act and the antitrust laws. That purpose is to encourage competition among buyers and sellers. *See Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 99 S.Ct. 925, 59 L.Ed.2d 153 (1979). This Court has stated that "our goal in applying the Robinson-Patman Act is to maintain active competition—including price rivalry—among the members of the business community." *International Air Industries, Inc.*, *supra*, 517 F.2d at 721.

Our review must necessarily focus on the evidence presented in this case. To avoid a directed verdict or judgment notwithstanding the verdict in a price discrimination case, the plaintiff "must have presented sufficient evidence to create a jury question with respect to each element of his case." *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 848 (5th Cir. 1981). The plaintiff must introduce what this Court has defined as "substantial evidence to create a jury question." *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc). This Court recently reaffirmed the *Boeing* standard in *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir. 1982) (en banc). Substantial evidence is "evidence of such quality and weight that reasonable and fairminded persons in the exercise of impartial judgment might reach different conclusions." *Maxey v. Freightliner Corp.*, 665 F.2d 1367, at 1371. Viewing all the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion," there must be a "conflict in substantial evidence" in order to create a jury question. *Id.* at 1371.

[3] When we turn to the plaintiff's evidence we find it inadequate in several areas, the first of which concerns whether the incentive programs were likely to lessen competition substantially among the Chrysler-Plymouth dealers or prevent Payne from competing. *See International Air Industries, Inc. v. American Excelsior Co.*, supra; *Borden Co. v. FTC*, 381 F.2d 175, 178-81 (5th Cir. 1967). While the plaintiff presented a good deal of evidence on the mechanics of these programs, i.e., how the dealers qualified for bonuses, there was very little evidence linking the programs to competition among the Birmingham dealers. The unsupported testimony of the plaintiff's witnesses spoke to either the supposed or the hypothesized effect of the programs and was in conflict even on that level. Mr. J. Truett Payne testified on the one hand that customers and salesmen had told him that the dealership was being undersold and that some salesmen had quit. Payne's expert witness, on the other hand, testified that the effect of the programs was not to undersell Payne, but rather to keep the price level artificially high. Neither witness, however, testified from the basis of actual sales experience or comparative sales pricing. Payne's unsupported testimony was on the basis of second hand statements repeated to him, while the expert testified from the perspective of general market theory.

The speculative and unsupported testimony in this case was legally insufficient to support a finding of unlawful price discrimination. The only documentary evidence the plaintiff presented to support its claim of lost sales was that its market share declined by 4% temporarily in 1972. There was no substantial evidence that the Chrysler incentive programs were the cause of this decline. Over the four year period of the challenged programs, Payne's market share actually increased by 1%.

In evaluating the degree of likely impact on competitive strength, we cannot ignore the actual competitive facts of the case. *See FTC v. Sun Oil*, supra. Mr. J. Truett Payne himself testified that the primary reason that some of the other dealers were able to grow during this period was that they had either opened new facilities or were located in the areas of town that were experiencing population growth. In addition, Payne testified that the main reason his used car business declined and substantially contributed to his business failure was that he was not able to get used car financing and was forced to wholesale his used cars. Furthermore, the defendant introduced testimony that the plaintiff had forsaken the new car market to some extent to pursue fleet sales and had made substantial sales in that area. Finally, the plaintiff did not dispute the testimony that the average difference in bonus payments over the relevant period of competition amounted to only $11.00 per car between the best performing dealer and the worst one, with Payne in third place.

The plaintiff's reliance on *FTC v. Morton Salt*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), and its progeny is not relevant to the facts of this case. *Morton Salt* upheld an inference of likely injury from the fact of substantial price differences granted to market leaders in a highly competitive market in which minor price differences significantly affected competitors' low profit margins. The plaintiff's evidence established hardly any of these elements. We conclude that there was not a conflict in substantial evidence and that Chrysler was entitled to a directed verdict.

III. Cognizable Injury.

[4, 5] In a treble damages suit under the Robinson-Patman Act a plaintiff must not only prove a violation of the Act, he must also demonstrate antitrust injury by a preponderance of the evidence. *See Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969); *Zenith Radio*, supra. In addition, he must do so "as a matter of fact and with a fair degree of certainty." *Terrell v. Household Goods Carriers' Bureau*, supra, 494 F.2d at 20. Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation are not sufficient. Evidence of a

slight decrease in market share roughly coincident with the alleged violation is not sufficient either. The plaintiff must put forth substantial evidence. If he fails to do so, the defendant is entitled to a directed verdict. *See, e.g., Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979); *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977); *Foremost-McKesson v. Instrumentation Laboratory*, 527 F.2d 417, 418–20 (5th Cir. 1976); *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 153 (5th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975). Only when the plaintiff has demonstrated the fact of injury may the court be lenient in the amount of evidence required to prove damages. *See Story Parchment Co., supra*, 282 U.S. at 562, 51 S.Ct. at 250 (1931). The plaintiff's evidence, as we have discussed, was not substantial as to either the likely or actual injury attributable to the Chrysler programs. As a result Chrysler was entitled to a directed verdict on this issue as well.

IV. Damages.

[6] Payne relied on its calculation of the alleged price discrimination to establish the amount of its alleged lost sales and profits. To indicate the going concern value of the dealership at the time it was allegedly forced out of business, Payne relied on two alternative methods of calculation. Under the first, Payne's expert assumed a good will value for the dealership of $52,000 in 1955 and appreciated this amount over 20 years at an annual rate of 4%. The expert testified that the $52,000 figure was not based on an examination of Payne's financial statements. It represented an unsupported estimate by Mr. Payne. The 4% rate was a rough average of the prevailing inflation and prime interest rates from 1955 until the time Payne folded. Under the second method, Payne's expert discounted projections of what the dealership's profits would have been if it had continued in business free of the incentive programs. The expert testified that he did not take into account local market changes or conditions. The projections were apparently nothing more than some of Payne's past earnings roughly adjusted according to Chrysler's performance nationwide or the performance of the automobile industry in general. If Chrysler or the industry had a good year it was assumed, without an explanation why, that Payne would have a good year also.

As was the case with Payne's evidence to support antitrust violation and injury, this evidence was clearly not such as to allow the case to go to the jury. Price difference without more does not indicate the amount of lost sales or profits. Self-serving and unsupported assumptions cannot sustain a calculation of going concern value. The burden of putting forth substantial evidence is not satisfied by mere speculation and guess work. *See, e.g., Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir. 1979).

Even though the burden of proving damages is lessened by the fact of antitrust violation and injury, the plaintiff is still required to put forth substantial relevant evidence. *See Story Parchment, supra.* As the Supreme Court pointed out, the policy behind the lenient damages rules is that it would be inequitable to allow a wrongdoer to protect his illegal acts by insisting that the plaintiff meet a rigorous standard in calculating damages. *J. Truett Payne Co., supra.* Even if we held that Payne had presented substantial evidence of violation and injury and could invoke the standard of lenity, we would nonetheless conclude that Payne's evidence was insufficient. As we indicated, Payne relied on nothing more than the mere fact of alleged price difference and the hypothesized effect of the difference on its business. In calculating the going concern value, the plaintiff's expert failed to document his basic assumptions or to consider local market conditions. *See Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667–68 (5th Cir. 1974). On this ground as well Chrysler was entitled to a directed

verdict. *See, e.g., Kestenbaum v. Falstaff Brewing Corp., supra*, 514 F.2d at 696; *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 953–55 (5th Cir. 1975).

The district court is directed to enter judgment for Chrysler.

REVERSED AND REMANDED WITH DIRECTIONS.

UNITED STATES of America, Plaintiff-Appellee,

v.

Dudley Lee BERRY, a/k/a David Sarver, Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

Jessica Linda Ann ZABISH, a/k/a Joanne Sarver, Defendant-Appellant.

Nos. 79-5471, 79-5472.

United States Court of Appeals, Fifth Circuit. Unit B

March 19, 1982.

Defendants were convicted before the United States District Court for the Northern District of Georgia, Albert J. Henderson, Jr., J., of possessing cocaine hydrochloride with intent to distribute, with one defendant also convicted of simple possession of such drug, and defendants appealed. On petition for rehearing en banc, the Court of Appeals, Frank M. Johnson, Jr., Circuit Judge, held that: (1) nonborder airport stops, if of extremely restricted scope and conducted in a completely noncoercive manner do not invoke the Fourth Amendment; (2) once a stop falls into the realm of a seizure it can be constitutional only if based on reasonable suspicion; (3) presence or absence of particular characteristic on a drug courier profile is of no legal significance in determining reasonable suspicion; (4) although there was reasonable suspicion to seize defendants outside airline terminal, probable cause was required as regards defendants' involuntarily accompanying officers from the concourse to drug enforcement administration office; and (5) voluntary consent to search attenuated taint of illegal arrest.

Affirmed.

Panel Opinion, 636 F.2d 1075, vacated.

Hill, Circuit Judge, concurred specially and filed opinion.

R. Lanier Anderson, III, Circuit Judge, joined by Fay, Circuit Judge, concurred specially and filed opinion.

Thomas A. Clark, Circuit Judge, filed dissenting opinion.

1. Criminal Law ⇐1144.12

In reviewing propriety of nonborder airport stop and search by drug enforcement agency agents the reviewing court viewed facts in the light most favorable to the Government. U.S.C.A.Const.Amend. 4.

2. Criminal Law ⇐1158(2)

Court of Appeals was bound by district court's adoption of magistrate's credibility finding that testimony of drug agents concerning events surrounding asserted consent to search was accurate. U.S.C.A. Const.Amend. 4.

3. Constitutional Law ⇐82(7), 83(1)

It is the Court of Appeals' duty zealously to protect individuals from abridgements of their rights to liberty and privacy. U.S.C.A.Const.Amend. 4.

4. Arrest ⇐63.4(1), 63.5(4)
Searches and Seizures ⇐7(1)

Supreme Court holdings in the Fourth Amendment area sculpt out, at least theo-

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

UNITED STATES COURT OF APPEALS

Eleventh Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Buchanon v. Macon County Bd. of Ed.	81-7185	3/22/82	M.D.Ala., 670 F.2d 185
Chrysler Credit Corp. v. J. Truett Payne Co., Inc.	77-2331	4/26/82	N.D.Ala., 670 F.2d 575
Coastal Petroleum Co. v. American Cyanamid Co.	81-8061	5/12/82	N.D.Fla., 673 F.2d 1343
Fowler v. U. S. Patent Office	81-5438	5/13/82	M.D.Fla., 673 F.2d 1343
J. Truett Payne Co., Inc. v. Chrysler Motors Corp.	77-2331	4/26/82	N.D.Ala., 670 F.2d 575
Mylar v. State of Alabama	81-7412	4/29/82	N.D.Ala., 671 F.2d 1299
N. L. R. B. v. Howard Johnson Co.	81-7437	4/19/82	N.D.Ga., 671 F.2d 1383
U. S. v. Brock	80-5621	5/14/82	S.D.Fla., 669 F.2d 655
U. S. v. Hobson	82-5138	5/12/82	N.D.Fla., 672 F.2d 825
U. S. v. Patrick	81-5280	5/12/82	M.D.Fla., 673 F.2d 1343

Syllabus

J. TRUETT PAYNE CO., INC. v. CHRYSLER MOTORS CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-1944. Argued January 21, 1981—Decided May 18, 1981

Petitioner, a former automobile dealer, brought suit against respondent automobile manufacturer in Federal District Court, alleging that respondent's "sales incentive" programs over a certain period violated the price-discrimination prohibition of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. Under its programs, respondent paid a bonus to its dealers if they exceeded their quotas—set by respondent for each dealer—of cars to be sold at retail or purchased from respondent. Petitioner alleged that respondent set petitioner's quotas higher than those of its competitors; that to the extent it failed to meet its quotas, and to the extent its competitors met their lower quotas, petitioner received fewer bonuses; and that the net effect was that it paid more for its automobiles than did its competitors. Petitioner contended that the amount of the price discrimination—the amount of the price difference multiplied by the number of petitioner's purchases—was $81,248, and that when petitioner went out of business, the going-concern value of the business ranged between $50,000 and $170,000. Respondent maintained that the sales incentive programs were nondiscriminatory, and that they did not injure petitioner or adversely affect competition. The jury returned a verdict awarding petitioner $111,24[illegible] in damages, which the District Court trebled. The Court of Appeals reversed, holding that it was unnecessary to consider whether a violation of § 2 (a) had been proved, since petitioner had failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury, as was required in order to recover treble damages under § 4 of the Clayton Act.

Held:

1. Petitioner's contention that once it has proved a price discrimination in violation of § 2 (a) it is entitled at a minimum to so-called "automatic damages" in the amount of the price discrimination is without merit. Section 2 (a), a prophylactic statute which is violated merely upon a showing that "the effect of such discrimination *may be* substantially to lessen competition," does not require, for purposes of

injunctive actions, that the discrimination must in fact have harmed competition. *Corn Products Co.* v. *FTC*, 324 U. S. 726; *FTC* v. *Morton Salt Co.*, 334 U. S. 37. However, under § 4 of the Clayton Act, which is essentially a remedial statute providing treble damages to any person "who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws," a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. Thus it must prove more than a violation of § 2 (a), since such proof establishes only that injury *may* result. Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477. Pp. 561–563.

2. The rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury, see, *e. g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, will not be applied here to determine whether petitioner, though not entitled to "automatic damages," has produced enough evidence of actual injury to sustain recovery. While it is a close question whether petitioner's evidence would be sufficient to support a jury award even under such rule, a more fundamental difficulty is that the cases relied upon by petitioner all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof. In this case, it cannot be said with assurance that respondent is a "wrongdoer" since the Court of Appeals went directly to the issue of damages after bypassing the question whether respondent in fact violated § 2 (a). The proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence was insufficient to support a finding of such violation. If the court determines that respondent did violate the Act, it should then consider the sufficiency of petitioner's evidence of injury. Pp. 563–568.

607 F. 2d 1133, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and STEVENS, JJ., joined. POWELL, J., filed an opinion dissenting in part, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 569.

C. Lee Reeves argued the cause and filed briefs for petitioner.

J. Ross Forman III argued the cause and filed a brief for respondent.*

**Robert H. Whaley* filed a brief for Ricky Hasbrouck et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* were filed by *Thomas E. Deacy, Jr.*, *E. Houston*

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is the appropriate measure of damages in a suit brought under § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.[1]

Petitioner, for several decades a Chrysler-Plymouth dealer in Birmingham, Ala., went out of business in 1974. It subsequently brought suit against respondent in the United States District Court for the Northern District of Alabama, alleging that from January 1970 to May 1974 respondent's various "sales incentive" programs violated § 2 (a). Under one type of program, respondent assigned to each participating dealer a sales objective and paid to the dealer a bonus on each car sold in excess of that objective. Under another type of program, respondent required each dealer to purchase from it a certain quota of automobiles before it would pay a bonus on the sale of automobiles sold at retail. The amount of the

---

Harsha, and *Alan I. Becker*, for Cessna Aircraft Co.; and by *John T. Cusack* and *Gordon E. Nash, Jr.*, for Vanco Beverage, Inc.

[1] Section 2 (a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (a), provides in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them . . . ."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

bonus depended on the number of retail sales (or wholesale purchases) made in excess of the dealer's objective, and could amount to several hundred dollars. Respondent set petitioner's objectives higher than those of its competitors, requiring it to sell (or purchase) more automobiles to obtain a bonus than its competitors. To the extent petitioner failed to meet those objectives and to the extent its competitors met their lower objectives, petitioner received fewer bonuses. The net effect of all this, according to petitioner, was that it paid more money for its automobiles than did its competitors. It contended that the amount of the price discrimination—the amount of the price difference multiplied by the number of petitioner's purchases—was $81,248. It also claimed that the going-concern value of the business as of May 1974 ranged between $50,000 and $170,000.

Respondent maintained that the sales incentive programs were nondiscriminatory, and that they did not injure petitioner or adversely affect competition. The District Court denied respondent's motion for a directed verdict. The jury returned a verdict against respondent and awarded petitioner $111,247.48 in damages, which the District Court trebled.

The Court of Appeals for the Fifth Circuit reversed with instructions to dismiss the complaint. 607 F. 2d 1133 (1979). It found that in order to recover treble damages under § 4 of the Clayton Act, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of damage. It found it unnecessary to consider whether petitioner proved that respondent's incentive programs violated § 2 (a) because, in its view, petitioner had "failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury." *Id.*, at 1135. Rejecting petitioner's theory of "automatic damages," under which mere proof of discrimination establishes the fact and amount of injury, the court held that injury must be proved by more than mere "[c]onclusory statements

by the plaintiff, without evidentiary support." *Id.*, at 1136–1137. The court concluded that the District Court erred in refusing respondent's motion for a directed verdict and in denying its motion for judgment notwithstanding the verdict. We granted certiorari, 449 U. S. 819 (1980), to review the decision of the Court of Appeals.

I

Petitioner first contends that once it has proved a price discrimination in violation of § 2 (a) it is entitled at a minimum to so-called "automatic damages" in the amount of the price discrimination. Petitioner concedes that in order to recover damages it must establish cognizable injury attributable to an antitrust violation and some approximation of damage. Brief for Petitioner 9. It insists, however, that the jury should be permitted to infer the requisite injury and damage from a showing of a substantial price discrimination. Petitioner notes that this Court has consistently permitted such injury to be inferred in injunctive actions brought to enforce § 2 (a), *e. g.*, *FTC* v. *Morton Salt Co.*, 334 U. S. 37 (1948), and argues that private suits for damages under § 4 should be treated no differently. We disagree.[2]

By its terms § 2 (a) is a prophylactic statute which is violated merely upon a showing that "the effect of such discrimination *may be* substantially to lessen competition."

[2] The automatic-damages theory has split the lower courts. The leading case approving the theory is *Fowler Manufacturing Co.* v. *Gorlick*, 415 F. 2d 1248 (CA9 1969), cert. denied, 396 U. S. 1012 (1970). See also *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988 (CA8), cert. denied, 326 U. S. 773 (1945) (involving §§ 2 (d) and 2 (e) of the Act); *Grace* v. *K. J. Kozin Co.*, 538 F. 2d 170 (CA7 1976) (involving § 2 (e) of the Act). The leading case rejecting the theory is *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F. 2d 457 (CA2), cert. denied, 353 U. S. 965 (1957). Accord, *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105 (CA3 1980); *McCaskill* v. *Texaco, Inc.*, 351 F. Supp. 1332 (SD Ala. 1972), affirmance order, 486 F. 2d 1400 (CA5 1973); *Kidd* v. *Esso Standard Oil Co.*, 295 F. 2d 497 (CA6 1961).

(Emphasis supplied.) As our cases have recognized, the statute does not "require that the discriminations must in fact have harmed competition." *Corn Products Refining Co.* v. *FTC*, 324 U. S. 726, 742 (1945); *FTC* v. *Morton Salt Co.*, *supra*, at 46 ("the statute does not require the Commission to find that injury has actually resulted"). Section 4 of the Clayton Act, in contrast, is essentially a remedial statute. It provides treble damages to "[a]ny person who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws . . . ." (Emphasis supplied.) To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969) (plaintiff "must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered"). It must prove more than a violation of § 2 (a), since such proof establishes only that injury *may* result.

Our decision here is virtually governed by our reasoning in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977). There we rejected the contention that the mere violation of § 7 of the Clayton Act, which prohibits mergers which *may* substantially lessen competition, gives rise to a damages claim under § 4. We explained that "to recover damages [under § 4] respondents must prove more than that the petitioner violated § 7, since such proof establishes only that injury may result." *Id.*, at 486. Likewise in this case, proof of a violation does not mean that a disfavored purchaser has been actually "injured" within the meaning of § 4.

The legislative history buttresses this view. Both the Patman bill, H. R. 8442, § 2 (d), 74th Cong., 1st Sess. (1935), as introduced in the House, and the Robinson bill, S. 3154, § 2 (d), 74th Cong., 2d Sess. (1935), as introduced in the Senate, provided that a plaintiff's damages for a violation of § 2 (a) shall be presumed to be the amount of the price discrimination. The provision, however, encountered such

strong opposition in both Houses that the House Committee eliminated it from its bill. H. R. Rep. No. 2287, 74th Cong., 2d Sess., 16 (1936), and the Senate Committee modified the provision to authorize presumptive damages in the amount of the discrimination only when plaintiff shows the "fact of damage." S. Rep. No. 1502, 74th Cong., 2d Sess., 8 (1936). The Conference Committee eliminated even that compromise, and § 2 (a) was passed in its present form. Congress thus has rejected the very concept which petitioner seeks to have the Court judicially legislate. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 199–201 (1974).[3]

II

Petitioner next contends that even though it may not be entitled to "automatic damages" upon a showing of a violation of § 2 (a), it produced enough evidence of actual injury to survive a motion for a directed verdict. That evidence consisted primarily of the testimony of petitioner's owner, Mr. Payne, and an expert witness, a professor of economics. Payne testified that the price discrimination was one of the causes of the dealership going out of business. In support of that contention, he testified that his salesmen told him that the dealership lost sales to its competitors and that its market share of retail Chrysler-Plymouth sales in the Birmingham area was 24% in 1970, 27% in 1971, 23% in 1972, and 25% in 1973. Payne contended that it was proper to infer that the 4% drop in 1972 was a result of the incentive pro-

[3] Relying on *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 757 (1947), petitioner argues that this Court has previously accepted the automatic-damages theory. In that case, the Court stated that if petitioner can show an illegal price discrimination under the Act, "it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices." *Ibid.* But that statement is merely dictum, since the only issue before the Court was whether a violation of § 2 (a) could be used as an affirmative defense to void a contract.

grams. He also testified that the discrimination caused him to "force" business so that he could meet his assigned quotas. That is, his desire to make a sale induced him to "overallow" on trade-ins, thus reducing his profits on his used car operation. App. 51–52. Payne adduced evidence showing that his average gross profit on used car sales was below that of his competitors, though that same evidence revealed that his average gross profit on new sales was higher. *Id.*, at 269.

Neither Payne nor petitioner's expert witness offered documentary evidence as to the effect of the discrimination on retail prices. Although Payne asserted that his salesmen and customers told him that the dealership was being undersold, *id.*, at 35–37, 92, 95, he admitted he did not know if his competitors did in fact pass on their lower costs to their customers. *Id.*, at 44, 57. Petitioner's expert witness took a somewhat different position. He believed that the discrimination would ultimately cause retail prices to be held at an artificially high level since petitioner's competitors would not reduce their retail prices as much as they would have done if petitioner received an equal bonus from respondent. *Id.*, at 103, 135. He also testified that petitioner was harmed by the discrimination even if the favored purchasers did not lower their retail prices, since petitioner in that case would make less money per car.[4] *Id.*, at 139.

---

[4] Respondent suggests that petitioner's inability to show that his favored competitors lowered their retail sales price should defeat recovery. That argument assumes that evidence of a lower retail price is the *sine qua non* of antitrust injury, that the disfavored purchaser is simply not "injured" unless the favored purchaser has lowered his price. If the favored purchaser has lowered his retail price, for example, the disfavored purchaser will lose sales to the extent it does not match that lower price. Similarly, if the disfavored purchaser matches the lower price, it will lose profits. Because petitioner has not shown that the favored purchasers have lowered their retail price, petitioner is arguably foreclosed from showing that it lost either sales or profits. Justice Cardozo seemingly adopted

Even construed most favorably to petitioner, the evidence of injury is weak. Petitioner nevertheless asks us to consider the sufficiency of its evidence in light of our traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury. In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123–124 (1969), for example, the Court discussed at some length the fixing of damages in a case involving market exclusion. We accepted the proposition that damages could be awarded on the basis of plaintiff's estimate of sales it could have made absent the violation:

> "[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact-finder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes,

---

this position in *ICC* v. *United States*, 299 U. S. 385, 390–391 (1933), a case involving rate discrimination under the Interstate Commerce Act:

"If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered price . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

Petitioner argues that is an overly narrow view of antitrust injury. To the extent a disfavored purchaser must pay more for its goods than its competitors, it is less able to compete. It has fewer funds available with which to advertise, make capital expenditures, and the like. Although the inability of petitioner to show that the favored retailers lowered their retail price makes petitioner's argument particularly weak, we find it unnecessary to decide in this case whether such failure as a matter of law demonstrates no competitive injury.

that defendants' wrongful acts had caused damage to the plaintiffs.' *Bigelow* v. *RKO Pictures, Inc.*, *supra*, at 264. See also *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 377–379 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 561–566 (1931)." *Ibid.*

In *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946), relied on in *Zenith*, film distributors had conspired to deny the plaintiff theater access to first-run films. The jury awarded damages based on a comparison of plaintiff's actual profits with the contemporaneous profits of a competing theater with access to first-run films. Plaintiff had also adduced evidence comparing his actual profits during the conspiracy with his profits when he had been able to obtain first-runs. The lower court thought the evidence too imprecise to support the award, but we reversed because the evidence was sufficient to support a "just and reasonable inference" of damage. We explained:

"[A]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." 327 U. S., at 264–265.

Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as *Bigelow*, that it does not " 'come with very good grace' " for

the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted. *Hetzel* v. *Baltimore & Ohio R. Co.*, 169 U. S. 26, 39 (1898) (quoting *United States Trust Co.* v. *O'Brien*, 143 N. Y. 284, 289 (1894). Accord, *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts"); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379 (1927).

Applying the foregoing principles to this case is not without difficulty. In the first place, it is a close question whether petitioner's evidence would be sufficient to support a jury award even under our relaxed damages rules. In those cases where we have found sufficient evidence to permit a jury to infer antitrust injury and approximate the amount of damages, the evidence was more substantial than the evidence presented here. In *Zenith*, for example, plaintiff compared its sales in Canada, where it was subject to a violation, with its sales in the United States, where it was not. And in *Bigelow*, plaintiff adduced evidence not only comparing its profits with a competitor not subject to the violation but also comparing its profits during the time of the violation with the period immediately preceding the violation.[5]

---

[5] *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931), is similarly distinguishable. In upholding a jury verdict against respondents for a violation of § 2 of the Sherman Act, the Court observed: "It is true that there was uncertainty as to the extent of damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result

But a more fundamental difficulty confronts us in this case. The cases relied upon by petitioner all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof. In this case, however, we cannot say with assurance that respondent is a "wrongdoer." Because the court below bypassed the issue of liability and went directly to the issue of damages, we simply do not have the benefit of its views as to whether respondent in fact violated § 2 (a). Absent such a finding, we decline to apply to this case the lenient damages rules of our previous cases. Had the court below found a violation, we could more confidently consider the adequacy of petitioner's evidence.

Accordingly, we think the proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence adduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act. We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed, and we think this would be a poor case in which to depart from that practice. If the court determines on remand that respondent did violate the Act, the court should then consider the sufficiency of petitioner's evidence of injury in light of the cases discussed above. We, of course, intimate no views as to how that issue should be decided. We emphasize that even if there has been a violation of the Robinson-Patman Act, petitioner is not excused from its burden of proving antitrust injury and damages. It is simply that once a violation has been established, that burden is to some extent lightened.

---

of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. . . ." *Id.*, at 562. "If the damage is certain, the fact that its extent is uncertain does not prevent a recovery." *Id.*, at 566.

In this case, by contrast, the issue is not so much the amount of damages as whether petitioner has in fact been injured by an antitrust violation.

For the foregoing reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting in part.

I concur in Part I of the Court's opinion, but simply would affirm the judgment of the Court of Appeals.

The Court of Appeals concluded that petitioner "failed to introduce substantial evidence of injury attributable to [respondent's program], much less substantial evidence of the amount of such injury." 607 F. 2d 1133, 1135. In Part II of its opinion, the Court today reviews the evidence, vacates the judgment of the Court of Appeals, and remands the case for a resifting of the evidence and determination of whether respondent violated the Clayton Act as amended by the Robinson-Patman Act. The Court identifies no error of fact or law in the judgment of the Court of Appeals, but vacates that judgment only because the Court finds it "unclear" whether there is sufficient evidence. I find no basis for this Court undertaking to second-guess the Court of Appeals as to the sufficiency of evidence.

Even if there were some satisfactory reason for us to review the evidence in this relatively uncomplicated case, I think the Court of Appeals was plainly correct in finding petitioner's evidence insufficient to show a competitive injury of the kind that the antitrust laws were enacted to prevent. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488–489 (1977). Section 2 (a) is a prophylactic statute that makes unlawful price discrimination that "may . . . lessen competition." Thus, a court cannot infer from the fact of a violation that defendant's behavior has caused plaintiff any injury. A plaintiff must show, to recover damages for violation of § 2 (a), that unlawful discrimination in price allowed a favored competitor to draw sales or profits

from him, the unfavored competitor. See *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F. 2d 457, 458 (CA2), cert. denied, 353 U. S. 965 (1957). Petitioner's evidence, which the Court concedes to be "weak," *ante*, at 565, amounts to nothing more than a showing that its market share declined temporarily 4% in 1972. Petitioner presented no substantial evidence that respondent's incentive program caused its market share to shrink. Indeed, over the 4-year period of the challenged programs its market share increased 1%. Rather, petitioner relied on its president's conclusory testimony, which consisted in major part of hearsay statements from petitioner's automobile salesmen. Hypothetical analysis of the "predicted effects" of respondent's program by an economics professor also was relied upon by petitioner to prove the actual cause of injury. One hardly would expect this Court to reject a Court of Appeals judgment that evidence as flimsy as this was insufficient to go to the jury.

My concern with the Court's opinion, however, goes beyond its reviewing the evidence. I have understood that in a Robinson-Patman Act case the plaintiff has the burden of proving the fact of antitrust injury by a preponderance of the evidence. See *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969). Only when this fact has been proved may a court properly be lenient in the evidence it requires to prove the amount of damages. See *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562 (1931). It is not at all apparent that the Court adequately recognizes this distinction.

It seems to me that today's remand measurably increases the uncertainty inherent in the generalities of the Robinson-Patman Act. Accordingly, I dissent.

CHRYSLER CREDIT CORPORATION, a corporation, Plaintiff,

v.

J. TRUETT PAYNE, INC., etc., et al., Defendants-Third Party Plaintiffs-Appellees,

v.

CHRYSLER MOTORS CORPORATION, a corporation, Third Party Defendant-Additional Party Defendant-Appellant.

No. 77-2331.

United States Court of Appeals, Fifth Circuit.

Dec. 7, 1979.

Rehearing and Rehearing En Banc Denied Jan. 18, 1980.

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, RONEY and FRANK M. JOHNSON, Jr., Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

This is an appeal from a treble damages judgment awarded against Chrysler Motors Corporation for price discrimination in violation of section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.[1]

[1]Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (a), provides in part as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of com-

From January 1970 through August 1974, the period at issue, Chrysler Motors was a wholly owned subsidiary of Chrysler Corporation, engaged in wholesaling Chrysler-Plymouth automobiles to retail dealerships throughout the country. J. Truett Payne, Inc., was one of four such dealerships in the Birmingham, Alabama, area.

Payne went out of business in May 1974. In September 1974, Chrysler Credit Corporation filed suit for the recovery of certain unrepaid loans. Part of Payne's response was the filing of this price discrimination claim against Chrysler Motors.

Payne alleged that as a result of certain discriminatory sales incentive programs conducted by Chrysler Motors among its dealerships in the Birmingham area, Payne had been forced to pay higher prices for Chrysler automobiles than had its competitors. Payne claimed that because of the higher prices it lost sales and profits, and was eventually forced out of business. Payne sought treble damages under section 4 of the Clayton Act.[2]

In defense, Chrysler Motors maintained that the sales incentive programs were available on a non-discriminatory basis to all Chrysler dealerships in the Birmingham area, including Payne, and denied that they had had an adverse effect on competition or that they had injured Payne.

The district judge severed trial of this Chrysler Motors issue from trial of the Chrysler Credit issues. Testimony

---

merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. . . ."

[2]Section 4 of the Clayton Act, 15 U.S.C. § 15, provides as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

was taken for six days. Chrysler's motions for a directed verdict made at the close of Payne's case and at the close of all the evidence were denied. The jury reached a verdict and award against Chrysler of $111,247.48 (Payne had asked for $180,000), which the court trebled. Chrysler's motion for judgment notwithstanding the verdict or for a new trial was denied, and Chrysler filed this appeal.

[1] It is well established that in order to recover treble damages under section 4 of the Clayton Act, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of the damage. *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 694 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974).

[2] We find it unnecessary to consider whether Payne proved that the Chrysler incentive programs violated the Robinson-Patman Act. Because Payne failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury, the district court erred in refusing Chrysler's motions for directed verdict and in denying Chrysler's motion for judgment notwithstanding the verdict.

I. Cognizable Injury

To show that Chrysler's incentive programs caused it to lose sales, Payne introduced the unsupported testimony of J. Truett Payne, its owner, that customers and salesmen had told him that the dealership was being undersold, and that some salesmen had quit as a result. Payne also introduced

evidence showing that its share of retail Chrysler-Plymouth sales in the Birmingham area was 24% in 1970, 27% in 1971, 23% in 1972, and 25% in 1973. Payne contends that it was proper to infer that the 4% drop in 1972 was a result of the incentive program.[3]

To show lost profits by reason of the programs, Payne introduced only the unsupported testimony of Mr. Payne that he was forced to lower prices in order to meet competition and that for the same reason the dealership had to, or possibly had to, give greater allowances on used-car trade-ins.

In an effort to show that the programs forced the dealership out of business, Payne relied on merely conclusory statements to that effect by Mr. Payne and an expert witness.[4]

[3, 4] Under *Boeing Co. v. Shipman*, 411 F.2d 365, 373-77 (5th Cir. 1969) (en banc) (standard for directed verdict and judgment notwithstanding the verdict), this showing was clearly not such as to allow the case to go to the jury. In an antitrust action, as noted above, the plaintiff must show that the defendant's conduct materially contributed to his injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 23 L.Ed. 2d 129 (1969). He must do so "as a matter of fact and with a fair degree of certainty." *Terrell v. Household Goods Carriers' Bureau, supra*, 494 F.2d at 20. Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation

[3]Payne also contends that the 2% increase in 1973 was the result of a 1973 revision of the incentive programs that resulted in sales quotas more favorable toward Payne. While it is true that certain of the incentive programs were so revised, none of these types of programs operated in 1973. The 1973 increase cannot be attributed to their revision.

[4]The expert prefaced his statement on the issue with the comment, "I really can't tell you without having, you know—it's a hypothetical question."

are not sufficient. Evidence of a slight decrease in market share roughly coincident with the alleged violation is not sufficient either.[5] The plaintiff must put forth substantial evidence. If he fails to do so, the defendant is entitled to a directed verdict. *See, e. g., Comfort-Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979); *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977); *Foremost-McKesson v. Instrumentation Laboratory*, 527 F.2d 417, 418-20 (5th Cir. 1976); *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 153 (5th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975).

[5, 6] Payne maintains on this appeal that in a section 2(a) case mere proof of the alleged price discrimination is sufficient to establish injury by reason of an antitrust violation entitling the plaintiff to damages. This Robinson-Patman "automatic damages" concept, as it has come to be called, has some precedential support. *See Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d 503 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773, 66 S.Ct. 231, 90 L.Ed. 467 (1945). But we decline to follow it. As the Supreme Court ruled in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), the antitrust laws do not provide

---

[5] *Cf. Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 547 (5th Cir. 1978), *cert. denied*, ___ U.S. ___, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979) (decrease in income, without more, does not establish fact of damage). In this case, as Mr. Payne himself testified, there was evidence that the material cause of the 4% decrease in market share Payne experienced in 1972 was the relocation of a competing Chrysler-Plymouth dealer into Payne's immediate sales area, and not the Chrysler incentive programs.

a damages remedy for all losses traceable to conduct violating the antitrust laws, only for losses that are part of the anticompetitive effect of such conduct. When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result. Both the statute and the courts recognize this. 15 U.S.C. § 13 (a). *See, e. g., United States v. United States Gypsum Co.*, 438 U.S. 422, 450, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor. *See, e. g., Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350, 357-59 (S.D.N.Y. 1978); *McCaskill v. Texaco, Inc.*, 351 F.Supp. 1332, 1341 (S.D.Ala. 1972), *aff'd sub nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973); Handler, *Changing Trends in Antitrust Doctrines*, 77 *Colum.L.Rev.* 979, 992-93 (1977). *See also Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969) (implying that disfavored purchaser must show more than mere price difference to recover damages). As discussed above, there is no evidence, much less substantial evidence, that such was the case here.

[7, 8] Payne's reliance on *FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), and its progeny is misplaced. In *Morton Salt*, the Supreme Court held that a violation of Robinson-Patman Act § 2 (a) may be inferred from a substantial price difference. 334 U.S. at 46-47, 68 S.Ct. 822. But the showing necessary to establish a section 2 (a) violation is not the same as the showing necessary to support a private action for damages. The Robin-

son-Patman Act is an incipiency statute.[9] Price discrimination which threatens competition but which has not caused any actual competitive injury may be held to violate the statute even though it will not support an action for damages. *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 *Harv.L.Rev.* 1127, 1127-28 (1976). *See also Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir.), *cert. denied*, 403 U.S. 911, 91 S.Ct. 2208, 29 L. Ed.2d 689 (1971) (private injury does not necessarily accompany public injury). What *Morton Salt* found inferable from a substantial price difference was a threat to competition sufficient to violate the statute. 334 U.S. at 46-47, 68 S.Ct. 822. Even assuming that *Morton Salt* is still viable, it is of no help to Payne. In order to recover damages, Payne had to show more than just a threat of antitrust injury. As discussed above, it failed to do so.

II. Amount of Damage

Our conclusion that Chrysler was entitled to a directed verdict is buttressed by Payne's failure to adequately prove the amount of its alleged injury.

Payne relied on its calculation of the alleged price discrimination to establish the amount of its alleged lost sales and profits. There is no necessary correlation, however, and Payne failed to establish one.

To indicate the going concern value of the dealership at the time it was allegedly forced out of business, Payne relied on two alternative methods of calculation. Under the first, Payne's expert assumed a good will value for the dealership of $52,000 in 1955 and appreciated this amount over 20

[9] Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), proscribes price discrimination "where the effect of such discrimination *may* be substantially to lessen competition. . . ." (Emphasis added).

years at an annual rate of 4%. The expert testified that the $52,000 figure was not based on an examination of Payne's financial statements. It represented an unsupported estimate by Mr. Payne. The 4% rate was a rough average of the prevailing inflation and prime interest rates from 1955 until the time Payne folded. Under the second method, Payne's expert discounted projections of what the dealership's profits would have been if it had continued in business free of the incentive programs. The expert testified that he did not take into account local market changes or conditions. The projections were apparently nothing more than some of Payne's past earnings roughly adjusted according to Chrysler's performance nationwide or the performance of the automobile industry in general. If Chrysler or the industry had a good year it was assumed, without an explanation why, that Payne would have a good year also.

[9-11] As was the case with Payne's fact of damage evidence, this showing was clearly not such as to allow the case to go to the jury. In an antitrust damages action, as noted above, the plaintiff must establish the amount as well as the fact of damage. The burden of proving the amount of damage is less severe than the burden of proving the cognizable injury. *See, e. g., Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Terrell v. Household Goods Carriers' Bureau, supra*, 494 F.2d at 23-24. But the plaintiff must put forth substantial evidence. The burden is not satisfied by mere speculation or guess work. *See, e. g., Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 815, 90 L.Ed. 1040 (1946); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir. 1979). Payne failed to meet this burden. A price difference without more does not indicate the amount of lost sales or profits. Self-serving and unsupported assumptions cannot sustain a calculation of going

concern value. On this ground as well, Chrysler was entitled to a directed verdict. *See, e. g., Kestenbaum v. Falstaff Brewing Corp., supra,* 514 F.2d at 695; *Copper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d 934, 953-55 (5th Cir. 1975).

The district court is directed to enter judgment for Chrysler.

REVERSED AND REMANDED WITH DIRECTIONS.

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Beard v. Starling	79-2778	3/26/80	M.D.Ga., 613 F.2d 312
Burdine v. Texas Department of Community Affairs	77-1101	3/10/80	W.D.Tex., 608 F.2d 563
Cadena v. Estelle	79-1503	3/17/80	W.D.Tex., 611 F.2d 1385
Conway v. Chemical Leaman Tank Lines, Inc.	77-2533	3/25/80	E.D.Tex., 616 F.2d 380
Davis v. Jackson County Port Authority	77-2708	3/10/80	S.D.Miss., 617 F.2d 377
Green v. Amerada-Hess Corp.	78-2927	3/18/80	S.D.Miss., 612 F.2d 212
Hicks v. Dobbs	78-2261	3/17/80	N.D.Ga., 612 F.2d 577
Jaffer v. Diefenderfer	79-3103	3/10/80	S.D.Fla., 612 F.2d 577
J. Truett Payne, Inc. v. Chrysler Motors Corp.	77-2331	3/18/80	N.D.Ala., 607 F.2d 1133
Kettering v. King William Association	79-2341	3/28/80	W.D.Tex., 613 F.2d 313
S & M Materials Co. v. Southern Stone Co., Inc.	79-2336	3/25/80	M.D.Ga., 612 F.2d 198
Turner v. Raynes	79-2037	3/10/80	E.D.Tex., 611 F.2d 82

DENIALS OF REHEARING EN BANC—Continued

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1—Continued			
U. S. v. Gregg	79–5140	3/10/80	N.D.Tex., 611 F.2d 881
U. S. v. Morejon-Pacheco	78–5748, 79–2084	3/10/80	S.D.Fla., 610 F.2d 1296
Watson v. Calion Petroleum Co.	78–1401	3/17/80	S.D.Miss., 613 F.2d 313
GROUP 2			
Chrysler Credit Corp. v. J. Truett Payne, Inc.	77–2331	3/18/80	N.D.Ala., 607 F.2d 1133

WINTER WINNERS

11/11/70 - 1/31/71

Paid on Sales After W/S Obj. Attained

Pur. Obj.	C/L Group	JTP Sales	JTP Reb./P.U.	All Others Reb./P.U.	Diff.
JTP - 99	Val-Bar	17	0	30	510
Central - 63	Bel-Sat	13	0	45	585
Bessemer - 39	Ch-Imp	42	0	60	2,520
Roebuck - 54	Fury	17	0	45	765
	Fy W/O	15	0	60	900
					$ 5,280

W I N T E R W I N N E R S

11/11/70 - 12/31/70

(Floor Plan Rebates Portion - Paid on Purchase)

	Rebates P.U.	Purchases
JTP	$ -0-	72
Central	26.30	77
Bessemer	26.57	48
Roebuck	41.05	95

TOTAL REBATES JTP WOULD HAVE RECEIVED - $2,955.60

1971 BIG DOLLAR PAYOFF

1/1/71 - 4/30/71

Rebates paid on Sales

C/L Group	JTP Sales	JTP Reb./P.U.	ROE. Reb./P.U.	Difference
Val	51	28.43	54.03	$1,305.65
Others	163	107.98	35.59	(NEG.)

1971 BIG DOLLAR PAYOFF

1/1/71 - 3/31/71

(Floor Plan Rebates Portion-Paid on Purchases)

	Reb./P.U.	Purchases
JTP	$ 26.38	188
Central	.49	109
Bessemer	26.00	98
Roebuck	30.81	129

Total rebate JTP would have received - $5,792.88

JTP received $4,800.00. Difference - $ 992.28

S U M M E R S E L L O U T

3/1/71 - Fall, 1971

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	ROE. Reb./P.U.	Difference
Val	110	$ 9.41	$25.00	$ 1,715.00
Bar-Sat-Fy	103	11.65	60.00	4,980.00
Ch-Imp	61	13.20	70.00	3,465.00
				$10,160.00

[THIS PAGE INTENTIONALLY LEFT BLANK]

W I N T E R P R O F I T D A Y S

11/21/71 - 1/31/72

Paid on Sales After W/S Obj. Attained.

C/L Group	JTP Sales	JTP Reb./P.U.	ROE+VEST Reb./P.U.	Difference
1972 Val-Bar	28	-0-	$ 35.00	$ 980.00
Sat	10	-0-	55.00	550.00
Fy-Ch-Imp	43	-0-	65.00	2,795.00
1971 Val-Bar	8	-0-	70.00	560.00
Sat	7	-0-	-0-	
Fy-Ch-Imp	15	-0-	130.00	1,950.00
				$6,835.00

STOCK ELIMINATOR

8/11/71 - 1/31/72

Rebates Paid on All Sales

C/L Group	JTP Sales	JTP Reb./P.U.	Hall Reb./P.U.	Difference
Compact	40	$ 68.75	$ 68.18	(NEG.)
Other	108	100.00	100.00	

C H R Y S L E R - P L Y M O U T H S E L L N O W

1/1/72 - 4/30/72

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	Vestavia Cen+Roe Reb./P.U.	Difference
Val-Bar	81	$17.72	$35.00	$1,400.00
Sat	30	14.67	55.00	1,210.00
Fy-Ch-Imp	72	52.22	65.00	920.00
				$ 3,530.00

CHRY/FY PROFIT PROGRAM

1/1/72 - 3/31/72

Rebate on Sales

JTP Sales	JTP Reb./P.U.	Bessemer Reb./P.U.	Diff.
70	$10.00	$82.76	$5,093.10

CASH IN WITH CHRYSLER

5/1/72 - 6/30/72

Rebate Paid on Sales

JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
31	$25.81	$80.43	$1,693.48

C L E A N - U P A N D C A S H I N

7/1/72 - Fall 1972

Rebate on Sales

JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
86	$39.53	$94.44	$4,722.22

1 9 7 2 S U M M E R S W E E P S T A K E S

4/1/72 - 7/31/72

Rebates on Sales

C/L Group	JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
Val-Bar	79	$ -0-	$ 42.02	$ 3,319.58
Sat	45	-0-	68.65	3,089.25
Fy-Ch-Imp	140	-0-	110.00	15,400.00
				$21,808.83
JTP received $9,689 stock rebate on 5¢/P.U. but would have made $12,119.83 more under terms of rebate program.				- 9,689.00
				$12,119.83

C H R Y S L E R - P L Y M O U T H T R I P L E - P A Y

10/1/72 - 12/31/72

Rebates Paid on Sales

El. Units	JTP Reb./P.U.	Central Reb./P.U.	Difference
152	$6.91	$49.23	$6,432.64

FURY - CHR - IMP TWIN DEAL DOLLARS

1/1/73 - 3/31/73

Rebate Paid on Sales

C/L Group	El. Units	JTP Reb./P.U.	ROE Reb./P.U.	Diff.
(3)	55	$3.636	$78.125	$4,096.88

CHRYSLER-PLYMOUTH EARLY

CLEAN-UP BONUS PROGRAM

6/1/73 - 1974 Model Day

JTP and Central opted for a Non-Discriminatory Program which gave them a 5% rebate on each 1973 Unit.

S U P E R E A R N I N G

1/1/74 - 3/31/74

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	Roe. Reb./P.U.	Diff.
Val	48	-0-	-0-	-0-
Sat	12	$ 35.00	$100.00	$ 780.00
Ch	19	50.00	150.00	1,900.00
'73 Ch	33	100.00	300.00	6,600.00
				$9,280.00

PRIME RATE ON EIGHTS

4/1/74 - 5/31/74

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb. Rec'd	Others Reb./P.U.	Diff.
Val	13	-0-	$ 50.00	$ 650.00
Sat	5	-0-	100.00	500.00
Ch	12	-0-	150.00	1,800.00
'73 Ch	19	-0-	200.00	3,800.00
				$6,750.00

"C" BODY BONUS
2/1/74 - 3/31/74
REBATES PAID ON SALES

El. Units	JTP Reb./P. U.	ROE. Reb./P. U.	Diff.
33	$163.64	$90.91	-----

	NEW VEHICLES Sales			Average Gross Profit		Total Profit	
1971	Retail	Fleet	Total	Retail	Fleet	Gross	Net
J. Truett Payne Co.	562	161	723	390	208	$252,389	$ 72,215
Vestavia Chry.-Ply.	369	4*	373	385	na	143,492	48,788
Central Motors	467	16*	483	311	na	150,156	13,085
Roebuck Chry.-Ply.-Imp.	688	4*	692	335	na	232,054	17,779
1972							
J. Truett Payne Co.	576	185	761	425	242	289,579	104,700
Vestavia Chry.-Ply.	568	4*	572	435	na	248,651	113,118
Central Motors	585	17*	602	372	na	223,776	75,472
Roebuck Chry.-Ply.-Imp.	765	5*	770	342	na	263,485	20,455
1973							
J. Truett Payne Co.	567	210	777	435	312	312,008	110,853
Vestavia Chry.-Ply.	549	10*	559	361	na	201,641	23,164
Central Motors	399	20*	419	392	na	164,147	32,081
Roebuck Chry.-Ply.-Imp.	753	5*	758	380	na	287,787	36,248

* Dealer's financial statements do not reflect Fleet Sales. Fleet unit sales quantities obtained from the "Dealer Fleet Selling Plan Summary"

Period 1971 through 1973

	Total New Unit Sales	Total Fleet Unit Sales	Fleet Sales % of Total
J. Truett Payne Co.	2,261	547	24.2%
Vestavia Chry.-Ply.	1,504	18	1.1%
Central Motors	1,504	53	3.5%
Roebuck Chry.-Ply.-Imp.	2,220	14	.6%

Continued on Page 2

[Def. Ex. 311]

BIRMINGHAM METRO SALES COMPAIRSON Period 1971 - 1973

	USED VEHICLES Total Profit				
1971	Unit Sales	Average Gross Profit	Gross	Net	Net Earnings Before Taxe
J. Truett Payne Co.	803	$104	$ 83,461	$ 10,721	$(27,354)
Vestavia Chry.-Ply.	381	291	110,894	44,855	6,684
Central Motors	1,079	188	202,821	96,281	54,651
Roebuck Chry.-Ply.-Imp.	1,761	232	408,519	162,497	47,752
1972					
J. Truett Payne Co.	931	$123	$114,901	$ 24,708	$(8,206)
Vestavia Chry.-Ply.	753	155	116,854	39,153	4,519
Central Motors	954	165	157,042	64,291	93,052
Roebuck Chry.-Ply.-Imp.	1,914	246	470,748	173,001	36,378
1973					
J. Truett Payne Co.	768	$108	$ 82,788	$ 9,114	$(53,510)
Vestavia Chry.-Ply.	710	231	163,867	53,300	(80,234)
Central Motors	735	253	185,607	104,055	36,065
Roebuck Chry.-Ply.-Imp.	1,985	245	486,395	181,728	50,053

55

[Def. Ex. 111
Part 2

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act: 15 U.S.C. § 13:

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

Section 4 of the Clayton Act, 15 U.S.C. § 15

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

[TR. 40]

Q. And when is the first time you became a Chrysler direct dealer?

A. In 1944 or '45.

Q. Where were you located, Mr. Payne?

A. 408 South 21st Street in Birmingham.

Q. How long had you or did you remain in that location?

A. About ten years.

Q. And were you selling Chryslers after you moved from that location?

[TR. 41]

A. Yes, sir.

Q. Excuse me. When did you acquire the J. Truett Payne Company?

A. Well, we bought out Leseur Motors in 1955 and merged the two companies.

Q. Now, in 1965 were you selling Chrysler automobiles, your company?

A. Yes, sir.

Q. Was Leseur?

A. Yes, sir.

Q. And what was the price, or the purchase price that you paid for this buying of the Leseur Motors?

A. I believe I paid forty-five thousand dollars for his fixtures and what equipment he had in parts.

Q. All right. Was there anything else included in that price?

A. No, sir.

Q. Out of that price, Mr. Payne, that you paid for Leseur, did he have forty-five thousand dollars worth of parts and fixtures on hand or was there anything else in that price?

A. No. I would believe that, as well as I remember, that about half of

that would be for equipment and parts and the other half for goodwill, I guess.

Q. Had he been in business a while?

[TR. 42]

A. Several years. I don't remember how long.

Q. All right. In any event, you bought him out and you started selling Chryslers with his inventory, is that correct?

A. Yes, sir.

Q. Did you have an inventory of your own?

A. I had an inventory of my own and then we took over some cars that he had, but we bought them from Chrysler.

Q. All right. What was the net worth of your business at that time, J. Truett Payne Company, the Chrysler dealer?

A. I would think around seventy-five

hundred or a thousand dollars. I don't know.

Q. Was any of that portion of that business amount made up of goodwill or was it all stock merchandise, parts?

A. In mine?

Q. Yes, sir, in yours.

A. I would say it was all in merchandise.

Q. All right. Since 1953 did you operate J. Truett Payne Company Chrysler-Plymouth dealership just like you operated it through 1974? Have you been operating it --

A. Yes.

[TR. 43]

Q. -- since 1955 with Chrysler?

A. Yes, sir.

Q. When did you terminate your dealership relationship with Chrysler Motors?

A. I believe it was in May of '74.

Q. All right. Prior to that time in the 1960's, in the early '60's, beginning of that decade, were you the only Chrysler Plymouth dealer in the Birmingham area or was there any other dealership?

A. Well, there had been dealers in Bessemer, but I believe we were -- what time are you --

Q. In 1960.

A. Well, I believe I was the only Chrysler dealer in downtown Birmingham until -- I don't know, when they put Central Motors in. Was it in '61?

Q. Well, in your best judgment, do you know? When they put in Central Motors, is that correct?

A. Yes, it was the first dealer they put in.

Q. After they put in Central Motors

there was you and Central Motors, is that correct?

A. Yes. When they put Central Motors in, they put them in originally as Plymouth only. They did not give them Chrysler and Imperial. It was just when they originally opened up, they opened up with Plymouth.

[TR. 44]

Q. And subsequent to that time did they acquire Chrysler and Imperial?

A. Sir?

Q. Did they start selling Chrysler and Imperials after that?

A. At a later date, yes.

Q. All right. During 1970 through 1974 you were selling, your company was selling Chryslers and Imperials and Plymouths, correct?

A. Yes, yes.

Q. Can you tell the ladies and

gentlemen of the jury what other dealers during that time, direct dealers, were selling Chryslers, Plymouths in the Birmingham area?

A. From '70 until --

Q. '74.

A. Well, I believe it was Roebuck, Roebuck Chrysler Plymouth, Vestavia Chrysler Plymouth, and Central Motors.

Q. All right. And yourself?

A. And us, yes.

Q. Can you tell the ladies and gentlemen of the jury who were your competitors in your market in the Birmingham market area for selling Chrysler and Plymouth automobiles during that time period?

[TR. 45]

A. It would have been Roebuck Chrysler, Central Motors, Vestavia.

Q. All right. Can you tell the

jury, the ladies and gentlement of the jury a little bit or characterize the type or quality of competition in the Birmingham market?

A. Well, it was rough. It was -- ask me that question again.

Q. Well, you said it was rough?

A. Yes, sir.

Q. Can you tell us whether or not you know if customers would check out the prices of your automobiles?

A. Oh, yes.

MR. INGRAM: Wait a minute. If it please the Court, I'm going to object to does he know this and that unless he's able to give specific facts and circumstances.

THE COURT: Well, if it was based on hearsay, it would not be admissible.

Q. No, sir. Mr. Payne, I'm not asking you based on hearsay. I want to

know in the industry your knowledge of the industry. Do you know whether or not your customers checked the prices of your cars and checked prices of your competitors' cars?

[TR. 46]

A. Yes, sir.

Q. Did that happen frequently?

A. Yes, sir, because every deal, every retail deal that you make is an individual deal and the customers, the people that shop us, that shop with us, shop with the other dealers and there's many things that contributed to it. As these dealers opened up, they opened up with new modern facilities, they put Grand Opening sales on, and people that buy automobiles, even though they pre-sold through news media, if they make up their mind they're going to buy a Chrysler car, they're going to shop the

other dealers.

Q. Well, do you know of -- let me ask you one question. You mentioned something about modern facilities. How old was your building?

A. I think --

Q. How long had you been in the location that you were in during 1970 through '74?

A. We moved in in 1955.

Q. Where was that?

A. At 231 South 21st Street.

Q. All right. And during that time period 1970 through 1974 can you tell the ladies and gentlemen on the jury whether or not on any occasions of your

[TR. 47]

own personal knowledge you knew the customers would shop the prices of the different dealers that you just mentioned?

A. Oh, yes, yes, sir, because they would tell you when you were trying to trade with them.

Q. All right. Have you ever talked to --

MR. INGRAM: If it please the Court, hold it. I object to any testimony about shopping prices. That's exactly what I was getting at. He said people would tell them. That's a very vague --

THE COURT: Well, that would be inadmissible as hearsay. I sustain that objection.

Q. All right. Mr. Payne, can you tell the Court where in your opinion most of your customers came from that purchased cars from your dealership, Chrysler Plymouth, new automobiles?

A. You mean the section of town?

Q. Yes, sir.

A. I would believe that most of our customers came from the eastern section and the southern section because that's the heavier populated section.

Q. And was there or were there repeaters, or people that came back to you yearly and bought new cars from you?

A. Over a period of years, yes. We had a lot of

[TR. 48]

repeat customers.

Q. And during -- let me rephrase that. During 1970 to 1974, do you know of people that came to you, would check out your prices on new Chryslers and Plymouths and then ended up buying another car at one of the other dealers?

A. Yes, sir.

Q. You know that how, Mr. Payne?

A. From -- in dealing with the people.

Q. Did they come back for service at

your automobile facility?

A. Many of them did. Some of them did not, but some of them did.

Q. So they would buy a car at a different location and come back to you?

A. Come back to us to service the automobile, yes.

Q. Did that happen numerous times --

A. Yes, sir.

Q. -- over that four year period?

A. Yes, sir.

THE COURT: Gentlemen, I will review my ruling. I will permit testimony as to what customers told him, not for the truth of what they said, but for what they actually did tell him. You may go into that.

[TR. 49]

Q. Thank you, Judge.

Now, Mr. Payne, during this four year time period were there any incen-

tive and rebate programs that Chrysler Plymouth or Chrysler Corporation sponsored for all the dealerships in the area?

A. Yes.

Q. Can you tell the ladies and gentlemen exactly what your understanding is of those rebate programs?

A. Well, they had different kinds of programs. Some of the programs were -- you were required to buy a certain amount of automobiles to participate in the program. Some of the other programs you were on a quota basis. After you sold a certain number of automobiles, you would become eligible for the rebate. There were several of those programs and it's been several years ago, I can't recall these programs, but that was the type programs they were.

Q. Do you know who established the

quotas that you mentioned on these programs?

A. Well, the Chrysler Corporation established them, but I don't know who.

Q. Were these programs written out? Were they written in written form?

A. Yes. Yes, sir. Yes, sir.

Q. Your Honor, we would like to introduce per

[TR. 50]

our stipulation some sixteen programs that took place over this period of time.

[TR. 51]

THE COURT: They will be received in evidence as authentic with leave to substitute any omissions.

MR. REEVES: Thank you, Judge.

Q. Mr. Payne, you mentioned earlier that you had been in that location for approximately since 1955 --

A. Yes, sir.

Q. -- right before you went out of business? How old was your facility there?

A. I'm not sure, but I believe it was built in 1925 or thereabouts.

[TR. 53]

Q. Mr. Payne, what did they tell you about the ownership or renting of those buildings, the facilities for Vestavia and Roebuck?

A. Well, just in general discussion they said that they were building -- they built Roebuck first; it was under construction a long time and it was discussed from time to time and they just told me that they were building it and were going to put a dealer there.

Q. Do you know when approximately it was built?

A. Well, I don't know exactly, but

it was around '67 or '68, wasn't it?

Q. All right. Now, what about Bessemer which later moved to Vestavia, when did they move to Vestavia, do you remember?

A. Was it '70?

Q. Well, do you have a judgment?

A. It was about that time. I don't remember exactly.

Q. And was that a new or old facility?

A. It was a new facility. It was pretty much the same discussion about Vestavia that it was about Roebuck.

Q. For these ladies and gentlemen who might not be from Birmingham, could you tell them in general terms where you're located and then describe if we

[TR. 54]

can, and I will draw where you tell me to draw, describe on the board where

these other dealers were put in. If we assume that this is the Birmingham city limits --

A. Well, you're going east would be Roebuck.

Q. This would be north right here. No, that's west. I'm sorry. East would be Roebuck, right?

A. Yes, sir.

Q. All right.

A. South would be Vestavia.

Q. O.K.

A. And west would be Central Motors.

Q. All right. Now, where are you located?

A. Well, based on the chart, I would be more or less kind of in the middle of the circle.

Q. Right here?

A. Yes. I was bottled in from all sections except the north.

Q. Can everybody see that? Let me move this over a little bit.

O.K. Now, did the Chrysler representatives that you mentioned, Sandusky and other people, tell you anything about who owned the Vestavia facility south of you?

A. Said Chrysler.

[TR. 55]

Q. Did they specify who, what corporation?

A. No, just Chrysler.

Q. All right, sir. Now, in these -- let's go back to these rebate programs a minute we were talking about. Did you participate -- did your company participate in the rebate programs that Chrysler sent out?

A. Well, we certainly didn't participate in all of them. I don't remember whether we participated maybe in one or

two or not, but we didn't participate in all of them or most of them.

Q. Were you able to -- and what was the effect of these rebate programs? Just tell the ladies and gentlemen what happened.

A. On me?

Q. On your company. What did they do?

A. Well, they had a -- we were placed in a disadvantage in a trading position and it had a demoralizing effect on my sales force. We made some deals, naturally. We had to sell some automobiles. But we would possibly have to over-allow beyond what we normally would on used cars to make a deal because in some of those cases the rebates ran from, I would believe, thirty to maybe two hundred dollars, maybe more.

[TR. 56]

MR. INGRAM: Your Honor, I'm going to object to this line of testimony. He's saying they had to overallow. He's not testified as to what other prices the other dealers were selling them for. He hasn't testified on any basis that there was any overallowance based on any sort --

THE COURT: Well, that's a conclusion.

Q. All right, sir. I'll go into it. These rebate programs, can you tell the ladies and gentlemen of the jury what happened if you got or if you qualified for the rebate program? What was the effect of that? Did you get anything from Chrysler?

A. Yes. You would get a rebate on the cars that you sold to the retail customer.

Q. All right. When you say a rebate, what happened? What was the effect of that rebate on your company's cost?

A. Well, it would lower the cost of the car.

Q. The cost of the car you purchased from Chrysler?

[TR. 62]

Q. What does a customer look for -- well, let me rephrase that question. When you were selling these automobiles did you ever have occasion to determine the price that you would charge the customer based upon what you might get back from the rebate program? Would that influence the price that you charged?

A. Would that -- the customer?

Q. No. Would it influence the price that you could charge the customer?

A. Well, yes, because on those rebate programs if I was not getting the

rebate and the other dealer was getting it, it would certainly influence it because he would be actually owning a unit cheaper than I owned it.

[TR. 65]

Q. Did you ever participate in what's known as a stock rebate on old models?

A. Yes, sir.

Q. Can you tell the ladies and gentlemen how that took place, what type of program that was?

A. At the introduction of the new models the Chrysler Corporation would give us five percent rebate on all new and unused Chrysler and Plymouth cars that we had in stock as of announcement date of the new models.

Q. All right. You didn't have to reach any sort of quota for that, did you?

A. No, sir.

Q. Mr. Payne, you have described generally to the ladies and gentlemen what these programs were like, these rebate programs that we're talking about today. Can you tell the ladies and gentlemen whether or not you have a judgment or knowledge as to whether or not it hurt your business that you could not participate in all of those programs?

A. Definitely it hurt our business when we couldn't participate.

Q. How would it hurt your business? Just explain

[TR. 66]

it if you can.

A. Well, we would be unable to make sales. We were not -- we were not in a competitive situation.

Q. How did that affect the customer that might be interested in buying a Chrysler or Plymouth automobile?

A. Well, if I understand your question, the customer would buy where he could buy at the best price.

MR. INGRAM: If it please the Court, I'm going to object again to this line of questioning. He makes these conclusions without any statement of fact to back them up. I think it's irrelevant to the issues in this case and I think it's unsupported conclusion.

THE COURT: I overrule that objection.

MR. REEVES: I'm sorry, Judge, I couldn't hear.

THE COURT: I overrule the objection.

Q. (BY MR. REEVES) Thank you, Judge.

What do you mean, Mr. Payne, when you said that you couldn't participate in the plans? I want to try to explain this as much as we can.

A. Well, I'll try to explain it as best I can. When we didn't qualify for the program, we couldn't meet the quota. All of those cars were bought from

[TR. 67]

Chrysler Corporation by all dealers at the same price. Now, the dealers that could meet their quotas and did participate in the programs were at a financial advantage because they were actually buying cars cheaper from Chrysler Corporation than we were because when they sold those cars they were rebated and in some cases it was as much as two hundred dollars. Now, I know for a fact because I was sales-minded, I talked to and I had been in business a long time, when I was a much smaller dealer, I did a lot of retail selling myself, and I knew a lot of these customers and a lot of these customers would tell me I can

buy this car at this other dealer for less money than I'm buying it from you and I was in an unfair competitive position. There was nothing I could do about it. Another thing that it did, you know, we worked salesmen on commission. They would go out and lose business based on that -- for that reason, and they would become disenchanted. It was like throwing a wet blanket over them when they would lose deal after deal after deal. It's just that simple, that those rebates put me out of a competitive, or weakened my competitive position.

Q. And when did your business close, Mr. Payne?

[TR. 68]

A. May 24th, '74.

Q. And at that time what caused the closing of the business?

A. Chrysler Credit Corporation

withdrew our line of credit.

Q. All right. Why did they withdraw it, do you know?

A. Yes, we were out of trust.

Q. When you say out of trust, what does that mean for the jury?

A. Well, we had sold some automobiles, that when we were unable to pay for them, our cash flow had stopped and had gotten to the point that we couldn't pay for them.

Q. So you just couldn't -- you didn't have enough money coming in from sales is what you're saying --

A. That's correct.

Q. -- to satisfy your credit?

A. That's correct, if I may --

Q. Well, let me, if I may -- I don't want you to volunteer anything. It might be objectionable.

A. All right.

Q. So let me ask you, Mr. Payne, if you can tell the ladies and gentlemen what caused you to not be

[TR. 69]

able to pay for the cars that you owed Chrysler Credit? What was the cause of that?

A. Well, I had -- I had run out of money. I was not able to sell enough automobiles at enough gross profit to make money. It was -- that would be the primary reason.

Q. Did the rebate program have any effect on your ability to sell at a high enough margin?

A. It should because again I was at a traded disadvantage.

Q. How did they affect you is what I want you to tell the jury? How did they affect your inability to make sales?

A. Well, they could offer them to

the public cheaper than I could.

Q. Who is they you're talking about?

A. The other dealers, the dealers who were participating in the prgrams [sic].

Q. When you're talking about in this area -- let me rephrase that. Who were your competitors again?

A. Central Motors, Vestavia and Roebuck Chrysler.

Q. So when you're referring to they in those dealers, you're talking about your competitors in Birmingham?

A. Yes, sir.

[TR. 77]

Q. (BY MR. REEVES:) Mr. Payne, yesterday you had mentioned a little bit about these rebate programs, incentive programs. Can you tell the ladies and gentlemen of the jury if fleet sales -- what a fleet sale is in the business?

A. A fleet sale is a sale of an automobile to people who qualified for wholesale price, so to speak, because they used several automobiles in their business.

Q. Were those sales made by you to different people?

A. Yes.

Q. For instance, whom would your company

[TR. 78]

sell a fleet to just as an example?

A. Well, Alabama Power Company, Southern Natural Gas, people of that type.

Q. Excuse me. I'm sorry. Go ahead.

A. Sir?

Q. I didn't mean to interrupt you. Go ahead.

A. Alabama Power Company, Southern Natural Gas, people in that type of

business.

Q. And did these rebate programs cover fleet sales?

A. No, sir. I don't remember, but there might at some time have been a fleet program with a rebate attached to it, but I don't remember of any, I don't remember any.

Q. Well, normally then they would not?

A. No, sir. No, sir, would not.

[TR. 81]

Q. I said, in your opinion, how much was the good will of the J. Truett Payne Company in 1955, when you merged?

A. I would say it would be at least twenty-five thousand dollars, because that's about what we figured LaSeuer's good will was at the time we bought them out, and we had been in business approximately the same amount of time.

[TR. 84]

Mr. Payne, the rebate programs that you have mentioned, I wonder if you could tell us -- I don't know if I asked you. I may be repeating. But if you could, tell the jury the effect those rebate programs had on your competition with the other dealers you testified that you competed with.

A. My quotas were high, and we felt for that reason or for that reason that we were unable to compete with the other dealers because we had to sell more automobiles, some cases in the purchase programs we had to purchase more automobiles, and in many cases we just wasn't in position to do it, we just didn't feel it would be a good

[TR. 85]

business to do it, and in many cases we actually couldn't do it.

Q. Did that affect the price that the ultimate purchaser in the Birmingham sales area would have to pay for a Chrysler-Plymouth automobile?

MR. INGRAM: I'm going to object to that, Your Honor. It's pure speculation without any further predicate on that question.

THE COURT: I overrule that objection.

Q. You can answer it, Mr. Payne.

A. Will you ask the question again?

Q. Will the reporter read that question back?

(The last question was read by the reporter.)

A. I would say no. I can't see where it would affect the retail customer, because the rebates in most of those programs were given to the dealer. They were not passed on to the customer.

[TR. 86]

CROSS-EXAMINATION

Q. Mr. Payne, you have talked about the fact that you went out of business, I believe, in May of 1974; is that correct?

A. Yes, sir.

Q. And I believe you said you lost your line of credit?

A. Yes, sir.

Q. And that was with Chrysler Credit Corporation?

A. Yes, sir.

Q. Mr. Payne, isn't it a fact and you've also alluded to a two hundred thousand dollar judgment by Chrysler Credit Corporation against your company; isn't that right?

[TR. 87]

A. Yes, sir.

Q. Isn't it a fact, Mr. Payne, that

the reason you went out of business and what happened was that you sold about two hundred thousand dollars worth of automobiles and didn't pay Chrysler Credit for them and that's the reason you lost your line of credit?

A. At the time that I lost my line of credit it was the reason.

Q. In other words, you were selling cars in what they call out of trust; isn't that right?

A. Yes, sir.

Q. And when that occurred, Chrysler Credit came in and in effect foreclosed on your inventory; isn't that right?

A. We assigned our inventory to Chrysler Credit.

Q. And you ended up owing them something like a hundred seventy to two hundred thousand dollars, didn't you?

A. Something like that.

Q. Now, you remember when I took your deposition, Mr. Payne, and we talked about your past history as an automobile dealer in Birmingham, and I believe you told me that you were the oldest Chrysler Plymouth dealer in the state, isn't that right?

A. Yes, sir.

[TR. 88]

Q. And didn't you tell me that you sold more cars than anybody else in the state?

A. I would believe that we sold more Chrysler and Plymouth cars than anybody.

Q. Now, that being true, when is the last time you made a profit in your company, Mr. Payne?

A. We lost money for the last four or five years that we were in business. I would say that the last time that we made a profit was before Chrysler put

these additional dealers in to share this market with us.

Q. You made a profit in 1968, didn't you, Mr. Payne?

A. I think so, yes, sir.

Q. And didn't all of those dealers go into effect prior to 1968?

A. No, sir.

Q. Who didn't?

A. Vestavia was not in.

Q. Wasn't Vestavia the same as Bessemer Chrysler, and located in Bessemer prior to 1968?

A. Yes, sir.

Q. All it did was move from Bessemer to Vestavia, is that correct?

A. No, sir. Bessemer Chrysler Plymouth was a

(TR. 89]

very small dealer and had a very small facility and did a very small business.

When they moved into Vestavia, they moved into supposedly a million dollar facility --

[TR. 90]

Q. All right. Thank you, sir. Now, you said that one of the problems you had was that Bessemer moved over to Vestavia, is that correct, and caused some of your problems?

A. Yes, sir.

Q. Of course, you had no contractual right, did you, Mr. Payne, to have an exclusive franchise in that area that covered Vestavia, did you?

A. Not at this time, no, sir.

Q. And in your mind there was nothing legally impermissible about Bessemer moving to Vestavia, was it?

A. Illegal?

Q. Yes.

A. I wouldn't know, sir.

Q. Now, when they moved over there, didn't they move over there in May of 1971?

A. It was about that time. I don't remember the exact date.

Q. Now, I'll ask you, after they moved over

[TR. 91]

there, Mr. Payne, in May of 1971, whether or not you in fact sold more automobiles in 1972 than you did in 1971?

A. I don't remember whether we did or we didn't, but I don't think the amount of automobiles that we sold would have anything particularly to do with the amount of profit we made. Due to increased competition and tougher competition, we were having to sell those cars at a smaller gross. So, certainly when Vestavia, when Chrysler opened up in Vestavia, it suddenly hampered our

business.

Q. Well, I don't understand that, Mr. Payne. I want you to explain that to me. If you are selling more cars than you were the year before with them over there in Vestavia, you're not losing any volume, how is it that that is not competitive?

A. Well, in 1969, Chrysler changed the body style of the automobiles. It wasn't a good year for Chrysler -- I'll try to answer this as best I can. The number of automobiles that you sell doesn't always determine the amount of gross, of profit that you make because the more automobiles you sell, the more it costs to handle them. We were trying desperately to reach our quotas and in many cases we had to take deals that under normal circumstances we wouldn't take

due to increased competition.

Q. Mr. Payne, I mean, are you telling me and are you telling the jury that the less cars you sell, the better off you are?

A. No, sir, I'm not telling the jury that. I'm trying to say that we were forcing business and when you force business you cannot force it at a profit, a good profit or a reasonable profit.

Q. Why were you forcing business?

A. Because I was trying to reach my objectives. I was trying to sell the automobiles. I was trying to stay in business. I was losing money and I was trying to stay in business.

Q. Well, what did that have to do with the sales incentive programs, Mr. Payne, if you were just trying to meet competition because they were selling

your customers? What's that got to do with the sales incentive program?

A. Well, on those rebate programs -- I have testified before that it gave the dealers that could participate an advantage because they owned those cars at a per unit less cost than I owned them and it put me at a disadvantage.

Q. Mr. Payne, now, I want to ask you this. I want to get to that subject matter. You've testified

[TR. 93]

that it put you in a competitive disadvantage, that you lost sales and that they were underselling you and all this sort of thing. Let me ask you this. How many sales did you lose? Do you have any record of the number of sales that you lost to another dealer because of the bonus paid those dealers under these incentive sales programs?

A. I wouldn't have any record of that, no, sir.

Q. You don't have any idea, do you?

A. I think if you would look at the -- when we started to losing money, we had been here for twenty-five years and I think that the fact that when they moved in these dealers on top of us, I think that is proof enough that that was the reason we were losing money.

Q. I'm not talking about the dealers, Mr. Payne, I'm talking about the sales incentive programs. I want to know how you know and what you have to prove that you lost sales to another Chrysler Plymouth dealer because of the bonuses paid under sales incentive programs?

A. I don't have anything specifically. That's been several years ago. I can't remember. I know this, that I was there every day in the operation of my business

and I knew daily that we were losing

[TR. 94]

business on account of that. I don't think any dealer could answer that question.

Q. That's right, I agree with you, Mr. Payne, because the only way you could answer that, isn't it a fact, is if you were to compare a sale that another dealer made and see what that individual bought it for and see what you would have sold the same car for; isn't that right?

A. I didn't understand the question.

Q. Well, the only way you'd ever be able to know about that sort of thing is to go and talk to your competing dealers and see if they took a customer and used the bonus rebate, the bonus incentive program to reduce the price of the car to the customer; isn't that right?

A. They had the rebate program, we

did not. So, I maintain that it put us at a disadvantage. I'm trying to answer these things as best I can and I won't change my mind about that.

Q. Well, let me ask you this, Mr. Payne, and I'll go back to my original question. Do you have records, do you have any concrete proof that you lost a certain sale or a certain number of sales that you otherwise would have made except for the bonus program?

[TR. 95]

A. I think it would reflect in our financial statement. That would be the only proof that I'd have.

Q. But you don't know of any specific sales? You couldn't tell me today?

A. At the moment I don't know, but I knew when it was happening when we were operating the business. I knew then because I talked to the customers, many

of them myself. My salesmen complained of losing business for that reason.

Q. Now, let me ask you this, Mr. Payne. Another thing you responded to is that your competitors, the other Chrysler Plymouth dealers were using this bonus money to reduce the cost of the automobiles, is that what you were saying, to the consumer?

A. I was saying that the rebate program reduced the cost of the automobile to the dealer. I would not know what happened after then. But my statement was that it reduced the cost per unit to the dealer that qualified for the bonus.

Q. Well, I believe it was your testimony also that it wouldn't affect the retail value of the automobile, the last thing you testified to, that it would not affect the retail value of the automobile, the resell cost of the automobile to the

consumer?

[TR. 96]

A. To the consumer? I would have no way of knowing that because I wouldn't know whether they passed that on to the consumer or whether they didn't.

Q. Well, you testified -- the last question Mr. Reeves asked you is whether or not it would have any effect on the retail sale of the automobile and you said no.

A. I wouldn't think so. I still say it would not.

Q. So, what you're saying is to the consumer or to the individual on the street the bonus program is not going to have any effect in enticing him to buy from one dealer or another?

A. I didn't say that. It might have an effect in enticing him to buy the automobile, but I don't think that

through a rebate program that anybody particularly benefitted except the dealers that were qualified for the program and the manufacturere [sic] because it helped the manufacturer move automobiles by giving rebates to those dealers who did qualify.

Q. Well, Mr. Payne, I need for you to explain to me that if the purchaser of the automobile, the retail purchaser doesn't get any benefit out of it, how is it going to affect competition? How is it

[TR. 97]

going to affect whether he buys a car from you or from somebody who qualified under one of the bonus programs if the retail price is not affected by it?

A. I don't think that the retail customer would actually know. He would know if he was getting a buy in a car at

a lower price, and if he was buying a car at a lower price, he would naturally buy it from the dealer that gave him the lowest price. That's where I say that the rebate program was unfair because it was on a unit basis.

Q. But you told me that the retail bonus was not used to reduce the price to the consumer. Now, how is that going to influence the consumer whether he buys from you or somebody else?

A. I can't answer that question, Mr. Ingram. Various advertising gimmicks are used daily to attract the customer. Now, how would the customer know whether he would profit by that or not? He thinks so because he goes in, I guess, to look at automobiles. There's programs now running where you can buy an automobile for one dollar above invoice. Now, how does the customer, you know, the

retail buyer know that he can buy that car for one dollar above invoice?

Q. Now, Mr. Payne, isn't it a fact that the

[TR. 98]

thing that really ended your business was the fact that you had a very poor used car operation?

A. No, sir.

Q. It is not?

A. No, sir.

Q. You didn't testify in that deposition that I took that the fact that your wholesale or that your line of credit on used cars was reduced is what put you out of business?

A. I tesified that my, that they reduced my line of credit on used cars and we were forced to wholesale the used cars that we could wholesale and try to retail the other automobiles. Now, that

was brought about by Chrysler Credit reducing our line of credit on used cars.

Q. Mr. Payne, on page 77 of your deposition, I want to ask you whether or not Mr. Hairston, the lawyer for Chrysler Credit Corporation, asked you these questions and whether or not you made these responses. "And in 1974, the year you closed, you owed them six hundred forty thousand dollars, in 1973 you owed them seven hundred eighty-nine thousand dollars. Is that what you mean by your credit, that your credit was curtailed? Answer: Mr. Hairston, I have never complained about my credit being curtailed

[TR. 99]

on new cars. The thing that put me out of business was when they curtailed my used car operation, and they never did --

I always had enough new cars to sell. That's not what I contend at all." Didn't you say that, Mr. Payne?

A. Yes, sir.

Q. And again on page 78 of your deposition following that dialogue we just had beginning at the bottom of 77. "Question: Well, there wasn't any real dramatic change in the amount of credit that you were actually receiving from Chrysler Credit during the time you were dealing with them, was it? Answer: On new cars? Question: On new. Answer: I don't know. Right there at the last they might have cut it some, but that is not my argument at all. It is the used cars. When they cut my used car credit, that's what murdered me." Did you say that?

A. I don't know whether I said those exact words or not, but I assume that I

did.

Q. And again on page 79 Mr. Hairston asked you this. "So, you were still maintaining the same sales level but the cost of doing business was increasing and cutting down on your profit picture; is that right? Answer: Mr. Hairston, this has come up twenty times before. The thing that murdered me was that I

[TR. 100]

would go and sell a new car and trade in a used car and because I didn't have the line of credit to put it on my used car lot, I had to take it would and wholesale it. That is what murdered me." Didn't you say that, Mr. Payne?

A. I assume that I did, yes, sir.

Q. Mr. Payne, in fact, didn't you attribute the fact that your used car operation as affected by your line of credit is what put you out of business?

A. No, sir.

Q. In other words, you didn't mean what you said in that deposition?

A. That was one of the things that caused it. The thing that put me out of business, and obvious from my financial statements, was the fact that when Chrysler Corporation built these new buildings and put in these dealers in strategic points in the heavily populated points. That's what primarily put me out of business. It's that simple.

Q. And it wasn't the sales incentive program?

A. The sales incentive program was one of the things that was involved. There was many things involved, but the rebate programs were certainly a part of it.

Q. Now, on these sales incentive programs, Mr.

Payne, are you familiar with them generally, those that you introduced into evidence?

A. Most of those programs are different. I'm familiar with them to a degree, yes, sir.

Q. And basically would it be fair to say that there are two types of programs? One had a wholesale purchase objective whereby you had to purchase a number of cars to first qualify and then you were paid on cars sold after you qualified. That's one type, is it not?

A. Yes, sir.

Q. And the other type, as I understand it, was basically a retail sales program without any wholesale purchase objective attached whereby you had some base line objective to obtain and then if you met that objective or went above

it, you received a bonus; is that correct?

A. Yes, sir.

Q. Now, as I understand it, and you tell me if I'm wrong, in order to qualify for these wholesale, what I call wholesale, retail programs where you had a wholesale purchase objective, basically what you were required to do was to purchase a given number of cars; is that correct?

A. Yes, sir.

[TR. 102]

Q. Now, isn't it a fact that in many of those programs, Mr. Payne, you did not qualify?

A. That's correct.

Q. In other words, you didn't buy the automobiles, purchase automobiles?

A. That's correct. In many of those programs we could not buy it because our

quota, our percentage that they expected us to buy was unfair, it was unreasonably high. I maintain that is the reason we could not participate in those rebate programs.

Q. You say it's unfair and unreasonably high. Do you know how they were calculated?

A. No, sir, but we were -- I know this, that we were charged with forty percent of the sales expectancy in this area and some of the dealers were down as low as twenty in those programs, and that certainly had something to do with the program.

Q. Now, the dealers you talked about that had a smaller fair share, they were younger dealers and they had been in business less time, had they not?

A. Yes, they had been in business less time.

Q. And they were located in different parts of the city. One was in the east, one was in Bessemer, until it moved to Vestavia, and one was further west toward Bessemer than you; isn't that correct?

A. Yes, sir.

[TR. 103]

Q. So y'all were located in different areas?

A. We were -- the sales areas, I assume, for all the Chrysler dealers were the same.

Q. And you were in the central downtown area, that's correct, isn't it?

A. Yes, sir.

Q. All right. And you were surrounded, there were a lot of dealers in the downtown area?

A. Yes, sir.

Q. And good, strong dealers, isn't that correct?

A. Yes, sir.

Q. Like Drennen Motor Company and Doug Willey Pontiac?

A. Yes, sir.

Q. And a number of them like that who are really strong dealers?

A. (Nodding head affirmatively.)

Q. Now I want to ask you something about your fleet sales, Mr. Payne. I believe you testified that when you sell a fleet, you get a lesser gross per unit sold, is that correct?

A. Yes, sir.

Q. All right. And I believe you also testified that as a general proposition, these fleet sales did not qualify under these sales incentive

[TR. 104]

programs?

A. Yes, sir.

Q. Mr. Payne, do you know what

percentage of your business was fleet?

A. Offhand, no, sir.

Q. What if I told you it was around twenty-four or twenty-five percent of your volume, volume of new cars sold?

A. Well, that's conceivable.

Q. And if that were true, and they didn't count toward retail sales for the sales incentive programs, wouldn't that have some affect on your earnings by the sales incentive programs?

A. I didn't understand the question.

Q. Well, if fleet sales do not qualify under these various sales incentive programs as retail sales for the purpose of payment, and your business constituted twenty-five percent fleet sales, wouldn't that have some affect on your earnings under these sales incentive programs?

A. I wouldn't think so.

Q. You say you would?

A. I would not.

Q. Why not?

A. Because the rebate programs were based

[TR. 105]

on a per unit basis, and it didn't apply to fleet.

Q. That's what I'm saying. If you sold a fleet car, and you couldn't get a bonus payment on that fleet car, that's a car you sold, you couldn't get a bonus on, isn't that right?

A. Yes, sir.

Q. And if you had a high percentage of your retail sales that were in fleet, that would have an affect on your earnings under our retail bonus program, wouldn't it?

A. I can't answer that question. I don't know.

Q. On these bonus programs, Mr. Payne, and of the number that have been introduced here into evidence, do you know on the total how you compared with the other four dealers in terms of earnings?

A. No, sir.

Q. Would it surprise you to know that you were second?

A. I didn't know that I was second, but if I had been able to compete in those bonus programs on those rebates, maybe I would have still been in business, if I was second.

Q. And, Mr. Payne, let me ask you this, on those bonus programs it's your understanding, is

[TR. 106]

it not, that anyone who qualifies at a given level receives the same amount of money per car as anyone else who

qualifies at the same level?

A. Yes, sir.

Q. No difference there?

A. No, sir.

Q. The difference is where you don't qualify at all or where you qualified at a lower level, is that correct?

A. Yes, sir.

Q. Now, on the wholesale purchase program where you're required to buy a number of cars before you could sell, you said you couldn't buy that number, you weren't able to buy them. I assume that's what you said, is that correct?

A. I don't remember the specific programs, but they could have been a number of things. We might have been up to our limit on our line of credit. We might have been overstocked with cars at the time. We didn't feel it was good business to enter into them and

for that reason we didn't. We felt that we could not afford to for one reason or the other. There was several things that would be involved there, and, you know, after all it's been several years ago, and I just can't remember [TR. 107] each specific program.

Q. Yes, sir, I can understand that, and I'm not asking you to do that. But basically it was an election on your part not to purchase, isn't that correct?

A. Yes, sir.

Q. Now, you say your line of credit -- I believe you testified in your deposition that I read that you always had an adequate line of credit for buying new cars, did you not?

A. Not always, but most of the time we did.

Q. And you said that your decision to

enter or not to enter one of these programs might be affected by what your inventory was, is that correct?

A. Yes, sir.

Q. And are you aware that in calculating the wholesale purchase objectives, the amount of the dealer's inventory is drawn out of the objective, what he already has on hand or in transit? Were you aware of that?

A. I didn't understand your question, Mr. Ingram.

Q. Well, you said that one of the reasons that you gave for not entering one of these wholesale purchase objective programs is that you may

[TR. 108]

have had a large inventory at the time?

A. Correct.

Q. My question is, do you know that in calculating your wholesale purchase

objective that Chrysler pulled out from that your present inventory to reduce what ordinarily would be your objective by the amount you already had in inventory? Did you know that?

A. I can't answer that question. I don't know whether -- I assume that they did, but I just don't know.

Q. Yes, sir. Now, Mr. Payne, one of your programs would come out, and isn't it factually true that one of the district managers would usually come by and explain the program to you?

A. Yes, sir.

Q. And tell you how it operated?

A. Yes, sir.

Q. I mean you had no problem understanding the programs?

A. No, sir.

Q. Now, Mr. Payne, let me ask you about -- I'll turn to another line here

that we've been discussing a little bit, and when you were talking about your value of your business and your good will,

[TR. 109]

and that sort of thing, I believe you said you purchased LaSeuer Motor Company in 1955, is that correct?

A. Yes, sir.

Q. You paid what, forty-five thousand dollars for it?

A. Yes, sir.

Q. And you are saying half of that amount to good will, is that correct?

A. Approximately.

Q. Well, what do you base that on? I mean, how do you make that division, half good will, half assets?

A. I didn't make that division. What we bought from LaSeuer Motor Company was his office equipment and his shop equipment and parts, and I figured about

half -- when I agreed to pay forty-five thousand dollars for the business, I figured that he did not have that many parts, but it was worth it for me to get the business and the rest I considered good will.

Q. Well, are you saying that what wasn't the value of the parts was simply a sum you paid him just simply to buy the business from him or was it good will or do you know or can you divide

[TR. 110]

them?

A. I'm trying to answer your question. I just didn't understand that question, Mr. Ingram.

Q. Well, what I'm asking you is, did you simply pay him forty-five thousand dollars to get and buy the business or were you really paying him for good will? I mean, was it set out that way in your

agreement?

A. No, sir. Mr. LaSeuer wanted forty-five thousand dollars for the business, and we felt that it was -- that we should buy it, and knowing or feeling that there wasn't forty-five thousand dollars worth of actual assets that we were getting, we got none of his accounts, none of his used cars or anything like that.

Q. You say feeling. Did you take an inventory? Did you do anything to determine what the actual value of the assets were?

A. Mr. Rawls, who was our business manager, handled that. It was his opinion that there wasn't enough there to compensate for the forty-five thousand dollars, but we felt that LaSeuer had a good reputation, he had been in business about the same length of time that we

had been, and we were willing to go on and buy it.

[TR. 111]

Q. And you did not continue to use LaSeuer's name in your business?

A. No, sir.

Q. All right. What did you do, just take over? Did he have a building or anything?

A. Yes, sir.

Q. He had some real property, and he had parts and equipment?

A. Yes, sir.

Q. Repair equipment and that sort of thing?

A. Yes, sir, office equipment and some shop equipment, but LaSeuer had taken it -- there had been a Chrysler dealer there before, and a lot of that equipment was old and unusable, but that's actually what happened.

Q. Now, Mr. Payne, you also testified that at that time that the value of your business in 1955 was, I believe you said, seventy-five thousand dollars, is that correct?

A. I can't testify to the exact figure, but I would say that that is reasonably correct, yes.

Q. Isnt't [sic] that what you said?

A. Yes, sir.

Q. Now, did you say that in addition to that or as a part of that, there was twenty-five thousand

[TR. 112]

dollars in good will?

A. I would say as a part of it.

Q. As a part of the seventy-five thousand dollars?

A. I can't answer that question. What I said was that I felt that we had been in business for ten years, and that

suddenly our good will -- we certainly had, in my opinion, twenty-five thousand dollars worth of good will, having been in business ten years in the same location.

Q. Did you sit down -- have you calculated the value of your business at that time? Do you have any figures or calculations that you arrived at that figure from at that time?

A. At the time that we made -- that we merged and bought out LaSeuer, was that your question?

Q. Yes, sir. Well, or at present? Have you made any calculations to derive that seventy-five thousand dollar figure?

A. I still don't understand your question, Mr. Ingram.

Q. Mr. Payne, let me simplify it for you.

A. Please do.

Q. You told me your business is worth seventy-five thousand dollars, and I want to know how you

[TR. 113]

derived that figure of seventy-five thousand dollars. I want to see where you sat down and added up things and came up with the severnty-five [sic] thousand dollars.

A. At what time, Mr. Ingram? Which business are you talking about, at the time we merged with LaSeuer or at the time I went out of business?

Q. I'm talking about at the time you merged with LaSeuer.

A. Well, certainly we had records to substantiate it at the time. Now, that's been twenty years ago.

Q. Yes, sir, that's what concerns me. You are now saying twenty years later it was worth seventy-five thousand

dollars, but you don't tell me the basis of the seventy-five thousand dollars. That's what I want to know. Where are your calculations to show that it was the value of seventy-five thousand dollars or is that just some figure you picked up out of the air?

A. Mr. Ingram, it would be absolutely impossible for me to go back twenty years and tell you exactly what I remember at the time, that when we made the transfer we borrowed the forty-five thousand dollars from CIT Corporation to buy out LaSeuer, and we had to furnish them with a reasonable financial

[TR. 114]

statement to be able to borrow the money.

Q. Mr. Payne, I'm talking about the seventy-five thousand dollars that you said your business was worth. Now, I don't know whether you're talking about

your business combined with LaSeuer or your business before you bought LaSeuer.

A. I'm talking about our business before we bought LaSeuer out, because CIT Corporation loaned -- made us a capital loan to buy out LaSeuer Motor Company, and it was a forty-five thousand dollar loan, and it's reasonable to believe, and I would believe that the business certainly was worth that or CIT wouldn't have loaned us the money.

Q. Well, you testified it was worth seventy-five thousand dollars?

A. I still testify that I think it was worth seventy-five thousand at least.

Q. But you can't tell me how you got the seventy-five thousand dollars, I guess is what you're saying?

A. Mr. Ingram, again this was twenty years ago. I would have no way of -- my memory is not that good. I can't

remember exactly what the assets were at that time. I would believe that it could have been worth even more money than that, but I

[TR. 115]

would believe or would have to believe that it was worth at least that much or CIT would not have made us a capital loan to buy out LaSeuer.

Q. But you don't have any present books and records to reflect that?

A. No, sir, I do not. No, sir, I do not.

Q. And it's just your best opinion, I suppose?

A. Yes, sir.

Q. All right. I just want to ask you a question. I may not have understood. But when was your present facility built?

A. I'm not sure, but I believe it was 1925.

Q. '25?

A. Or it could have been 1935. I'm not sure. I wouldn't know.

Q. Now, when you went out of business in 1974, Mr. Payne, I believe you valued the present value of your property at fifty to seventy thousand dollars or the value of the business at that time?

A. Yes, sir.

Q. Now, I'm going to go through the same thing we did on the seventy-five thousand dollars. I want you to tell me how you got fifty to seventy thousand dollars?

A. Well, at the time we went out of business

[TR. 116]

after we had turned over our inventory to Chrysler Credit, we had some office equipment, some other equipment and I would -- we were there -- we had been

in business for thirty years. It was actual -- actually it was a going concern. We had not -- the company -- the corporation was still in existence, and I feel that the good will alone would have been worth seventy-five -- fifty to seventy-five thousand dollars.

Q. Well, now, you say the good will alone. Let me ask you if you took this into consideration in figuring that, Mr. Payne: Now, here you had a business that hadn't made a profit since 1969; here you had a business that didn't even own the building they were in, and the building was built in 1925 or 1935, and leased, and isn't it a fact that your Chrysler franchise agreement says you can't sell your franchise without the written consent of Chrysler?

A. That's correct.

Q. Did you take all of that into

consideration in arriving at that figure, Mr. Payne?

A. Yes, sir, I took it all into consideration, because a lot of people would like to have a downtown or Chrysler dealership, and I would believe

[TR. 117]

that that would be more than a fair price as far as good will is concerned for a company that had been in business thirty years.

Q. And hasn't made a profit in the last five or six years?

A. That's correct, sir. We made profit from time to time. Other businesses, other automobile dealerships right in the City of Birmingham have gone for periods of time without making a profit. Maybe if we had been able to participate in those rebate programs, maybe we would have had a better flow of

cash and could have made a profit instead of having a long losing streak.

Q. And maybe if you had had a better used car business, you would have stayed in business, isn't that right?

A. And I'm not trying to get into a discussion with you, Mr. Ingram. Basically I believe and I cannot change my mind that the fact that Chrysler Corporation came in and put dealers all over me in new buildings, that participated in the same occupation that I was participating in, that I can't help but believe that that is what put me out of business. I will die believing it, because that is the primary reason. I did all right for twenty-five years without

[TR. 118]

that competition.

[TR. 123]

REDIRECT EXAMINATION

[TR. 124]

Q. Okay. You also mentioned on your examination with Mr. Ingram that there was tough competition in this area, and that you were having to sell at a smaller gross profit in order to compete?

A. Tjat's [sic] correct.

Q. Could you in many cases meet the low price that the other dealers, Chrysler-Plymouth dealers were offering?

A. No, sir.

[TR. 125]

Q. Was this during the rebate programs that we're talking about?

A. Yes, sir.

Q. Did those rebate programs -- I think you have said -- let me rephrase it.

I think you have said those

rebate programs affected the cost per unit?

A. They did.

Q. Now, if you had a higher cost per unit because you didn't participate in the rebate program, and another dealer here did participate in it, and had a lower price per unit, then would that affect the price at which you could offer the car for sale to the public?

A. Yes, sir.

Q. So it would affect the price of the car to the public, is that correct?

A. It could, yes, sir.

Q. Okay. Can you lean back a little, Mr. Payne. There you go. You were breathing in the microphone. That's all right.

Mr. Payne, do you know how many cars you sold, your corporation sold in 1970? Would that be or would that be

reflected on some document somewhere?

[TR. 126]

A. It would be reflected on a financial statement.

Q. You're talking about the dealer financial statement?

A. Yes, sir.

Q. Do you know whether or not or did you ever discuss with Chrysler Corporation whether or not in 1970 your sales for the Birmingham area amounted to forty percent of the business in this area, in other words, what they said was your fair share?

A. Well, now, that was my fair share, according to Chrysler Corporation. We discussed it from time to time, yes, sir.

Q. That's because you never did -- you could not ever get to that fair share?

A. That's correct.

Q. During these rebate programs you told Mr. Ingram that you didn't have any specific data on each sale that your company lost. Can you tell us how you know that your company lost sales because of the rebate program?

A. Well, your customers would come into your showroom, and you would lose the business there. You knew they bought Chrysler automobiles, because it would be shown in your registration sheet, and

[TR. 127]

they would tell you, "I could buy this car over here for less than I can buy it from you, and I'm going to buy it over there," and in many cases some of our customers that we had had for years bought and then came back to us to service the automobiles for them, even for the free service.

[TR. 134]

GEORGE IGNATIN

[TR. 137]

Q. Can you tell the ladies and gentlemen of the jury just briefly what types of programs and what are the effects and what happens when a dealer

[TR. 138]

participates in those programs in Birmingham?

A. It's my understanding that this is a fairly normal procedure in the automobile industry, at least it is for Chrysler. They have a regular means of rebating monies to the dealership. These are bonus programs, quota programs set up in which each of the dealers is given some kind of a planning potential or a fair share and if they meet or exceed that, depending on which program, they then get certain monies back from

Chrysler. Now, the effect of this is to reduce the cost of the car to the dealers per unit. The money is paid by Chrysler in almost all of these programs on the number of cars that these dealers sell to final consumers. The dealers pay Chrysler an equal amount for the cars and then the effect of this, or of all these programs, then, is to reduce the cost to the dealer of the cars that the dealer buys from Chrysler.

Q. Can you tell the ladies and gentlemen if there is a purchase objective in most of these programs, and tell them what that means.

A. In a couple of programs, not most of them as I recall, there was what we call a wholesale purchase objective as well as a retail objective. Now, the purchase objective refers to the dealer's

purchases from Chrysler. The retail objective refers to the number of cars the dealer sells to ultimate consumers. Now, as I say, in a couple of these programs, not a majority of them, the dealers have to purchase a certain number of cars from Chrysler before they qualify for the rebates which are based on the sales made to the ultimate consumers.

Q. So, the monies paid are based on the sales for the most part; is that correct?

A. Yes. The monies in all cases except, I think, two where there was a floor plan involved, and it's not clear whether that's a purchase or retail, but in all the cases other than that, the actual rebate or discount on cost was paid on retail sales by the

dealership to consumers.

[TR. 191]

Q. Do you have a total figure, Dr. Ignatin, for the amounts of rebates that you have figured on your chart in the last column, the charts, excuse me, that we were going over a little while ago that shows the total difference over the four year span for J. Truett Payne Company?

A. Yes. The total difference between what -- you mean between what J. Truett Payne would have received if they had not been discriminated against?

Q. Right.

A. My figure is eighty-one thousand two hundred forty-eight dollars and ninety-four cents.

[TR. 202]

Q. Now, based on your knowledge and the fact that you have been teaching and

dealing in competition and the effects that price differences have on competition in a given market, can you tell the ladies and gentlemen of the jury your opinion of the effect that these programs that you've charted for us have on competition in the Birmingham market?

MR. FORMAN: Your Honor, I would object to that on the grounds he shows no knowledge of the automobile market, that he's made any studies in the automobile market.

THE COURT: I overrule. His opinion, the credibility of it is for the jury.

A. This is, of course, in the form of some degree of speculation. But we do go back to economic theory and see what we would predict would happen from this kind of a situation. The cost difference to Payne means that they're paying Chrysler

more per unit than the other dealers. Now, they have to compete with these other dealers and they have to compete although they're paying higher costs to Chrysler for the cars. Now, this has a two-pronged

[TR. 203]

effect on competition which we would look for. First, it makes Payne less able to compete in the selling of cars. It's normal business procedure and it's well known that the salesman discounts off of list price, and the ability of the sales[man] to discount off of list price clearly will be related to the cost of the dealership to the automobile company. So, if you have two companies competing with each other and one has a higher cost than the other, the ability of the one company to compete is less than the other. Now, not only does

this impair Payne's ability to compete with the other company, it also hurts competition in the sense that the company enjoying the price discrimination is insulated from competitive forces and does not itself have to compete vigorously, which is to say, they're isolated from the competition that would have resulted from Payne if Payne had gotten the equally low price or the equally high rebate. So, Roebuck or Central, which in most of these cases were the ones who received the benefits of these price discriminations, were insulated from having to compete as vigorously with Payne as they otherwise would have had to.

Q. What effect does that have on the price of a given product to the ultimate consumer?

[TR. 204]

A. Well, the predicted effect is that

these other companies not having to compete as hard and Payne not being able to compete because of this price discrimination, the predicted effect is that the price that the ultimate consumer would pay for the goods would be slightly higher.

Q. Have I asked you, Dr. Ignatin, to determine from the dealer financial statements of the J. Truett Payne Company as best you could the different cash flows and revenues over a given period of time?

A. Yes, I did look at that.

Q. Have you examined the volume of sales over a period of time from 1967 through 1974 for J. Truett Payne Company?

A. Yes, I have.

Q. Where did you get all this information?

A. From the financial statements.

Q. Dealer financial statements?

A. Dealer financial statements, yes.

Q. And have you made an attempt -- let me rephrase that question. In the studies and courses that you are teaching at the University of Alabama and elsewhere, does the study of economics get involved with or do you determine the going value or the market value of a going concern in a market,

[TR. 205]

business of selling products in a given market?

A. Yes, this is a standard question in many economics courses and finance courses, the valuation of a business, yes.

Q. And have you made an attempt to make an evaluation or give your opinion as to the market value of J. Truett Payne Company as of May 28, 1974, when it

went out of business?

A. Yes, I have made two attempts. I have used two methods.

Q. When you say two attempts, you mean you took two different approaches?

A. Yes, two different methods.

Q. Could you tell the ladies and gentlemen of the jury your opinion as to the value of the going concern of J. Truett Payne Company on May 28, 1974?

A. O.K.

MR. FORMAN: Your Honor, we'd object to that until he lays an adequate predicate of what he did.

THE COURT: I overrule the objection.

Q. You may answer.

A. First let me say the problem involved is to figure out what J. Truett Payne would have been worth in May of 1974 as a going concern if they had not

suffered the price discrimination which I have

[TR. 206]

estimated cost them approximately eighty-one thousand dollars over the previous four years. Now, J. Truett Payne lost money in each of those four years and they would have lost eighty-one thousand dollars less than that if they hadn't been discriminated against. So, the question, then, for me to figure out is how much was that business worth as of May, 1974, if they had not been discriminated against in these programs, which is to say, had eighty-one thousand dollars more than they actually did. Now, I used two methods. The one method is a very simple method which I used just to get a ballpark estimate to see if I'm going to come to somewhere in the right place to it. For that I went back to

what the business was worth back in 1955 when it opened in the location it was in in 1974. From conversations with Mr. Payne, he told me that he bought out Leseur in 1955 for forty-five thousand dollars and he estimated that of that purchase price, about twenty-two thousand five hundred dollars was goodwill. Now, goodwill refers to the value of the business beyond its physical assets. This refers to the value of customers and the good name of the business. Well, at the time that J. Truett Payne bought Leseur in 1955, he merged his own business, which it was itself

[TR. 207]

a going concern into the business, or he actually did it the other way, he merged Leseur into his business at a new location, and from conversations with Mr. Payne he said that his business was worth

about a hundred thousand dollars at the time. He was not clear as to what the goodwill of his business was worth.

Q. Let me give you an assumption or a hypothetical to take into account in your answer, Doctor, that assuming that J. Truett Payne has stated or testified that his goodwill at that time was approximately twenty-five thousand dollars. Could you make an opinion, give your opinion as to the goodwill of the company as of May 28, '74?

A. He declared in court that it was twenty-five thousand dollars?

Q. Yes. I want you to assume that.

A. Now, the estimates I had made the other day which I gave to the other attorneys was that I assumed about a thirty thousand dollar goodwill involved for Mr. Payne's business based on what he had paid for Leseur's goodwill and if

his evaluation of his company was a hundred thousand dollars, that it would be worth somewhere around thirty thousand dollars. I started on the assumption that his

[TR. 208]

goodwill in 1955 was fifty-two thousand five hundred dollars. Now, you're saying that it would be, that his part was only twenty-five thousand. That would reduce it to forty-seven thousand five hundred dollars, the goodwill in 1955.

Q. Right. Do you need a calculator, Doctor?

A. I think I might be able to do this by hand.

Q. I apologize.

A. It looks like about a twelve thousand dollar difference.

Q. What is your opinion as to the market value of the going concern as of

A. Now, using this first method, I used a figure of about a four percent growth in the value of that firm per year for each of those twenty years. Now, the method I used was to use a combination of interest rates and rates of inflation. Economists use both methods. It usually depends on which one is higher and what they're interest in seeing. I don't feel particularly strong about either method. They're both good methods. They're both accepted methods in the profession. I'm not prepared to argue that one method is superior to the other. I prefer using both. So, I used four percent, which is just a rough average of the inflationary and the prime interest

[TR. 209]

rate over that twenty year period.

Interest rates tended to be a little higher than that and inflation tended to be a little lower than that four percent. My figures indicated that with my original estimate of fifty-two thousand five hundred as the going concern value in 1955, that the firm in 1974 would be worth about a hundred fifteen thousand dollars. Given what you just said that Mr. Payne testified, if the firm started out at forty-seven thousand five hundred dollars, that would mean, and this is a guess, I think I need a calculator, you can use one if you want, but it's going to be slightly over a hundred thousand dollars. I don't know if you need precision on this anyway.

Q. Is that a common and standard method in your profession as to make adjustment of a value of the goodwill of a company over a period of years?

A. Yes. It's not the preferred method, but it is one other method if you have no other way and it is good to give you some idea of what kind of estimate you're coming up with to check your figures to see if things are happening. Obviously the value of Payne's business could have grown more or less than this four percent average per year over the twenty years. A better method is the second method which

[TR. 210]

I used, and this was an attempt to estimate how much money J. Truett Payne would have earned or lost in each of the four years after it went out of business.

Q. The second method is also a standard method in your profession in determining goodwill and value of a going concern?

A. Yes.

Q. O.K.

A. Now, in 1974, Payne lost twenty-two thousand three hundred thirty-five dollars in the four months it was in business. However, I also determined that in 1974 they lost sixteen thousand and thirty dollars due to price discrimination in these rebate and bonus programs, which means that in 1974 Payne would have lost a little over six thousand dollars if it had not suffered price discrimination in these programs. Now, they were in business for four months. I took that figure of about sixty-three hundred and five dollars and I multiplied that by three, and that came to nineteen thousand dollars and I raised it to twenty because it's easier to work with and I said let's assume that Payne would have lost twenty thousand dollars during 1974 if they had been in

business the entire year and had not been subject to these discriminatory rebates. All right. 1974 was

[TR. 211]

a very bad year in the American automobile industry. This was the year following the Arab oil boycott, the embargo on oil sales, the extremely rapid increase in the price of all forms of energy and the overall inflation in the country. In addition, gross national products, the total dollar value of goods and services sold in this country in real terms fell in 1974. So, it was a very bad year for the whole economy and it was particularly bad for the automobile industry. Now, in 1975, what would Payne have done? Well, I related 1975 to '74. '75 was a bad year for the American automobile industry, but not as bad as 1974, although Chrysler had their worst year in their history in

1975. This was a disaster year for Chrysler, in large part, however, due to overseas operations. Now, what I figured was that given the fact that '74 was such a bad year with inflation, with the rising pric of gas, with Chrysler being caught perhaps with the wrong models or whatever, but in real bad shape, that if Payne would have lost twenty thousand dollars in 1974, he probably would have lost around ten thousand dollars in 1975. Now, that ten thousand dollars loss in 1975 needs to be refigured back as to its discounted value in 1974.

[TR. 212]

Q. Is that because -- can you tell the ladies and gentlemen why?

A. As I understand it, what I'm trying to do here is figure out how much the firm was worth in 1974 and so

losses suffered in 1975 need to be discounted either by the rate of inflation or the interest rate to figure out how much the value in 1974 of these losses in 1975 were.

Q. Okay.

A. Again we're trying to figure out what the value in 1974 was for losses or gains in years after 1974. I used a six percent discount figure. Now, here again we have three different figures. We can use the rate of infliation [sic], we can use the prime rate of interest or the legal rate, and the legal rate is six percent. That has never appealed very much to economists except coincidentally. We've always preferred primary or the rate of increase in the Consumer Price Index. The reason I use six percent is because that is a better figure for later years and it's

actually over -- this understates the value of Payne's business, if I use that lower figure in 1975.

Q. So this would be a conservative result?

A. Yes, this is a conservative figure, and

[TR. 213]

I wanted to do it for consistency. Instead of using like a nine percent in '75, and then a six percent figure in '76, I figured I would just use a six percent figure for both years, even though this reduces the value of Payne's business slightly. It's not enough to make a big difference, though.

Okay. For 1976, what would have happened? Well, 1976 was a banner year, this was the best year in Chrysler's history, this was the best year in the American automobile history. General

Motors made the largest profit they had ever made. Chrysler made the largest profist [sic] they had ever made. American Motors made the largest profit they had ever made.

To see how well J. Truett Payne would have done in 1976, if they could have stayed in business, and I think they could have stayed in business because as I said, they suffered $81,000.00 worth of discrimination, and their losses in '74 and '75 would have only been $30,000.00, so I then went back to see what J. Truett Payne's best year was, and coincidentally J. Truett Payne's best year also was the best year that Chrysler had ever had prior to 1976, so the Chrysler Corporation's best year prior to 1976 was 1968. J. Truett Paynes best year was 1968.

[TR. 214]

In 1968 J. Truett Payne made $36,000 some odd dollars, a little more than $36,000.00. Now, how much would that $36,000.00 that Payne made in 1968 have been in 1976, recognizing inflation, the growth of the economy, growth in the Birmingham area, et cetera? Well, the method I used again was a conservative method. I decided to use the increase in profits that Chrysler itself came up with between those two years.

Now, Chrysler made approximately 33 percent more in 1976 than Chrysler made in 1968. It seemed to me then very reasonable to say that Payne would have made about 33 percent more in 1976 than it would have made -- than they made in '68. So they made a little more than $36,000.00. I think the exact figure was $36,800.00 that they made in 1968.

I increased that by one-third, and I came out to a round $50,000.00 is what Payne would have made in 1976, if they could have stayed in business until last year, and of course that has to be discounted and when I discount that at a six percent rate for two years, that is a present value in 1974 of $44,500.00.

Now, the question is, what would Payne have done in 1977? Well, '77 is a good year for automobiles, it's a better year for Ford and General Motors than it is for Chrysler. Now, remember Chrysler

[TR. 215]

had the best year in its history in 1976. This year they are not doing quite as well. I believe their sales were off about twelve percent as opposed to last year. So I figured that Payne's profits and sales probably would have fallen off for 1977, and so I estimated that

although 1977 will be a good year, and all of the signs are favorable, that the economy is starting to pick up even after the bad winter, that Payne still would have made at least $20,000.00 this year, and when this was discounted back to 1974 values that comes out to $16,792.00 using six percent discount figure.

By the way, I said the economists don't usually like the legal six percent figure. We've got a very nice coincidental situation today. The rate of inflation is about six percent, the prime rate on interest is six percent, and the legal rate is six percent today, so it's one of those happy coincidences in history when they all come together to use the same discounting figure, and there is some reason to believe that this will stay that way over the next six to eight

months.

Okay. For 1978, again we are trying to figure out what's going to happen. I suspect that '78 will be about as good a year as 1977. There

[TR. 216]

will be changes in the American automobile market, no doubt, but basically in terms of predictions of what happens to Gross National Product, the rates of inflation, et cetera, '78 looks like it ought to be a slightly better year than 1977. Looks like it will be --

MR. FORMAN: Your Honor, I'm going to object to him going any further. This is pure speculation. He even said he just suspects this.

THE COURT: I sustain with respect to '78.

Q. All right. Dr. Ignatin, then based on up through your judgment in '77

as to the performance that J. Truett Payne Company would have had, had it stayed in business, can you give us your opinion as to the value of the company as far as its value as a going concern in 1974, when it went out of business?

A. Okay. Up through 1977, I can add that, it comes out to about $32,000.00 in additional value which is to say $32,000.00 would be the discounted value in 1974 of the earnings from 1974 through 1977 that Payne would have earned if they had not been subject to this discriminatory bonus and rebate program, and if they had stayed in business through 1977, so that was $32,000 -- approximately $32,000.00

[TR. 217]

I think it comes out to $31,858.00.

Q. All right. What's the --

A. Well, that's not precise. That's more precise than -- somewhere around $32,000.00.

Q. All right. Now --

A. Now, in addition to that, however, if the firm had stayed through 1977, it would have been a going concern, and it would have had a value in 1977. This would have a value to someone who would purchase the business.

MR. FORMAN: I object to this. He's already trying to recover future earnings, and now he's going to try to capitalize future earnings at some arbitrary date.

THE COURT: Overrule the objection.

Q. I'm interested right now in getting your value as to your opinion in 1974. I think you're getting to it. I just want the value and then we can talk about how you got it.

A. I wanted to go back on that. What I'm trying to do again is see how much Payne would have earned or lost over those next four years, and then the question is, what would the value of that firm have been in 1977, and then try and discount that back to 1974 values.

[TR. 218]

Q. Okay.

A. So the question is, how much would this firm be worth in 1977 to a prospective buyer in the Birmingham market who wanted to go into business and take over a going concern which is now profitable and faced with non-discriminatory rebates and bonus programs, and what I was assuming then was about a $20,000.00 a year net profit, that how much is the firm worth that's makeing [sic] about $20,000.00 a year, and the answer is we use a discount figure of ten percent, a

conservative figure, and say that the capitalized value of that firm in 1977 would have been $200,000.00. That's what a prospective buyer would be willing to pay to get an income stream of $20,000.00 a year.

Q. And then you discount that figure of $200,000.00 back to 1974 dollars?

A. Discount that figure back into 1974 dollars. Now, again I did the figure of 1978, $200,000.00 in 1978, at a six percent rate of discount would discount to a value of $158,400.00 in 1974. If we discount it back from 1977, the value of that firm would have been about $170,000.00, and I don't have it exactly because --

Q. Well, your best judgment.

[TR. 219]

A. -- my calculator battery went dead.

Q. Your best judgment is what we are interested in. Approximately $170,000.00?

A. Yes.

Q. Do you take into account at that time -- you said the value as a goind [sic] concern would be $170,000.00?

A. Yes.

Q. Do you take into account the losses during --

A. Yes.

Q. -- this time?

A. We take into account the losses and the gains which would have netted out to a plus $32,000.00.

Q. Oh, I see. The $32,000.00 figure is taking into account the losses over the past five years, and the gains over the next three?

A. Correct.

Q. Okay. So that's your figure then, $170,000.00?

A. He had $32,000.00 worth of net earnings which offset the losses or the total would be $32,000.00 in 1974 dollars plus an additional $170,000.00, and since these are just rough figures because of my calculator problem, what I'm saying is that this method says that the value of Payne's business in 1974 when he went out of business was right around

[TR. 220]

$200,000.00. Now, the first method gave me $100,000.00 That was $170,000.00 plus the 32.

Q. Oh, I'm sorry.

A. So it should be about $200,000.00. So these are the two methods. As I say, I prefer the second method. I think it's a more reasonable figure.

Q. Do you think that this method that I am writing on the board now is the more

reasonable method?

A. Yes, that is a more reasonable method, because it's not based on this constant gain of value over the twenty year period between 1955 and 1974.

Q. Now, I want to ask you, you've been through the methodology and how economists value companies. Is that standard in normal practice to value companies in that method, by that method?

A. Yes.

Q. And accepted in the practice of your field?

A. Yes.

Q. I'm sorry, you'll have to speak up.

A. Oh, yes. Yes, yes, it is.

Q. All right, sir.

MR. FORMAN: Your Honor, I would like to

[TR. 221]

move to strike all of this testimony concerning the going value of the concern either on the first method or the second method. It's all based on speculation. It's one assumption after another. There is no relation of that to the Birmingham market, and he says Chrysler may have had a good year. He doesn't say whether the Birmingham market is a good market for Chrysler or a poor market for Chrysler. He in no way relates anything back to what was happening here in Birmingham.

THE COURT: Overruled.

[TR. 222]

Q. Just one moment, Judge, I think I'm about through.

Doctor, in your opinion as an economist, did these rebate programs that you've studied have a good or an adverse effect on competition between

the four dealers, four Chrysler-Plymouth dealers in those years?

A. Oh, I think it reduced competition. I think it was an injury to competition. As I said before, it had a two-pronged effect. It reduced Payne's ability to compete, and by reducing Payne's ability to compete, it reduced the need for these other companies to compete as vigorously. So it reduced the vigor of competition in the Birmingham market for Chryslers and Plymouths.

Q. Thank you. Judge, at this time I would like to offer into evidence the exhibits that we have used as summaries of those programs which we had previously offered. We identified them all in Dr. Ignatin's testimony.

THE COURT: All right.

MR. FORMAN: Your Honor, we would

to object to those, these been no showing, not even a basic showing that those dealers are actually in competition, no showing by this expert that he's

[TR. 223]

made any study along that line.

THE COURT: Overrule the objection.

CROSS EXAMINATION

[TR. 228]

Q. Dr. Ignatin, is it a fair statement of your testimony that the programs in which you have concluded that there is some discrimination, results in some discrimination of price, are the programs where you have basically taken the amount of money which, say, J. Truett Payne Company made, divided the number of cars that he sold during the time of that program into that figure, and come up with a payment per unit, and when that payment

per unit differs, you have considered that to be discrimination?

A. Yes. Again, what I did is, I took the amount of rebate on each car line group that J. Truett Payne received, and I divided that by the number of cars that Payne sold, and that gave me the rebate per unit that Payne got on that car line group.

I then went to the other dealers and took the amount of rebates they got for each car line group, and divided that by the number of cars sold in each car line group, and where there was a difference, I would then take the difference in per unit rebate that the other dealers got, and subtracted what Payne got on a rebate per unit, and I multiplied that by the number of cars sold

[TR. 229]

by Payne, and that was the difference

between the two, or what I would call the difference due to the discrimination, yes.

Q. Okay. The difference in payment, and you said that was the discrimination?

A. Yes. There was a difference per unit in the payment Chrysler made to the dealers.

[TR. 255]

Q. Dr. Ignatin, I believe you've testified on your direct examination that you felt these sales incentive programs had an adverse effect on competition, one, in a sense, because J. Truett Payne's salesmen could not, as you say, discount, could not discount the price of the cars?

A. As much as --

Q. As much as the other dealers?

A. Uh huh.

Q. And because you say the other

dealers are insulated from competition?

A. Yes, because J. Truett Payne could not discount their cars as much as they otherwise could have. This meant that the other firms did not have to discount their cars as much as they would have had to.

Q. You say the effect of this would be, the price that the ultimate consumer would have to pay might be slightly higher?

A. Yes.

Q. Let me ask you this: do you have any evidence that the other car dealers discounted their cars more than J. Truett Payne Company did during the period '71 through him going out of

[TR. 256]

business, the date he went out of business on May 28th, 1974?

A. No, I did not compute that.

Q. Let me ask you this: if the other dealers took the incentive money and simply ran it through the corporation into their pocket, the pocket of the principal stockholders, what effect would that have on J. Truett Payne Company?

A. Well, the fact that Payne did not get the money to run through to its stockholders, of course, injured Payne, but their ability --

Q. It injured the stockholders?

A. Yeah. It would injure the stockholders of the Payne corporation, if they didn't have that money to run through. But it would also reduce the ability of the Payne people to compete.

I'm not too sure exactly how you just run that money through. This rebate is, in fact, a reduction in the cost of the car that Chrysler is getting from these dealers.

A. The point that I am trying to make is that exactly what these firms do with it is not at all clear. The effect as it hits Payne, however, is that they get a lessened ability to compete.

Q. I don't understand how they have a less ability. Let's just say the dealer pays all the -- let's say Roebuck --

A. Uh huh.

Q. -- receives more incentive money, all of his incentive money is paid to his salesman as, say, a commission.

A. Uh huh.

Q. The price that they are selling the car for may not be lowered. How is that going to have an adverse effect on J. Truett Payne Company?

A. Well, in that case, if they didn't lower the price -- of course, the

salesman can lower the price. The ultimate deal is worked out between the salesman, the sales manager and the customer,

[TR. 258]

and the salesman in selling the car, since he's getting more for the car, will try harder, and one of the methods salesman have in the automobile industry of trying harder is to reduce the amount of commission they make on the car.

A typical salesman might figure if he sells the car for $5,000 he will make $500, this is just hypothetical. If he knocks the price down to forty-eight hundred dollars he might make only $400. Well, he might just want to do that. And with this extra money coming in, of course, he's got the ability to do that and compete, whereas, the Payne salesman and the Payne Company does not.

Q. But in effect if the other company did not lower their price, the J. Truett Payne Company is not going to be adversely affected by competition, isn't that a fact?

A. Well, if both companies charge the same price, then the gross profit would be different per car. And, yes, it would hurt Payne. They would be getting less per car than the other company would by the amount of that difference in rebate.

[TR. 260]

Q. Doctor, when you gave us your calculations of the goodwill of J. Truett Payne Company as of May 28, 1974, you used two methods?

A. Right.

[TR. 261]

Q. The first method, in effect, you discounted -- well, let's go through that.

A. O.K.

Q. In the first method, you attempted to determine the goodwill of J. Truett Payne Company after the merger between J. Truett Payne Company and Leseur which occurred in 1955?

A. Right.

Q. And you said that Leseur, in talking to Mr. Payne, you decided that Leseur had twenty-two thousand five hundred dollars of goodwill?

A. Correct.

Q. Did you see any books or anything to verify this determination?

A. No.

Q. You say you also had to take Mr. Payne, Mr. Payne's statement that the goodwill value of his business was twenty-five thousand dollars?

A. I took that in court. I had determined from my own conversations

with Mr. Payne that his goodwill was on the order of thirty thousand dollars.

Q. How did you determine that?

A. That was based on his estimate that his firm was worth about a hundred thousand dollars, that when he had merged Leseur into his company or his firm

[TR. 262]

into Leseur, whichever way it went, that his firm was worth about twice as much as Leseur's and that he had paid about twenty-two thousand five hundred for the goodwill of Leseur. So, I had estimated that Payne had around thirty thousand dollars worth of goodwill in his own business at the time of the merger. Now, I understand that in court Mr. Payne had said about twenty-five thousand dollars. So, that was about a five thousand dollar difference between the estimate I had made and what Mr. Payne himself said in

court.

Q. You never made any independent study of any records to verify that Mr. Payne's company may be worth twenty-five thousand dollars, did you?

A. No, I did not.

Q. So, what you did, you then totaled the twenty-five thousand and the twenty-two thousand five hundred and came to a figure of forty-seven thousand five hundred dollars which was goodwill value of the merged company in 1955?

A. Yes, as an estimate, as a bench mark, as a bench mark to check on the other method which I find preferable.

[TR. 264]

Q. Let me ask you this. When the companies were merged, the name of Leseur was dropped, was it not?

A. Yes.

Q. Don't you believe that would

eliminate some of the goodwill, if not a large portion of the goodwill attached to that company?

A. It might. It would depend on exactly how the merger was done, the advertising campaign at the time. As I understand it, Mr. Payne took over the Leseur Agency and the location. So, there would be some -- there's a trade-off in there also that -- goodwill isn't based on the name in the sense of the name. When we use the term name, we're talking about the reputation of the dealer, and the question would be did Payne then acquire the reputation of Leseur when he acquired the company and the location.

Q. You have no way of estimating that, do you?

A. Well, from what he said he paid for it. Whether he got it was another

story.

Q. Whether it disappeared after he took over would be a different story?

A. It might and it might not. We don't assume that it disappears just because he took over. He paid for it. He assumed it and then he started

[TR. 265]

dealing. Whether it disappeared, I don't know.

Q. Well, after you made this initial assumption that it was forty-seven thousand five hundred dollars as the goodwill, and that's what it is, an assumption, you then took a discount figure of four percent?

A. Yes. It's not a discount figure in this case. I increased the value by four percent per year for the next twenty years until 1974.

Q. And that was based on an

inflation rate and the interest rate?

A. Yes, a combination of the two, a rough average of the two.

Q. Did you take into any consideration in arriving at the four percent figure the automobile market during that period, whether it was good or bad, its ups and downs?

A. Well, this is one of the reasons why I don't think this method is all that good and why I used it as a bench mark. The market went up and down over the years. He had some good and bad years over that twenty year period.

Q. How do you know that?

A. Through talking with him and seeing some of his financial statements.

[TR. 266]

Q. What financial statements did you see?

A. I saw them going back to, what,

1966, I believe, his profit and loss figures. I believe it went back to '66.

Q. You have nothing between '55 and '66?

A. No, I did not look at them. I just relied on my conversations with Mr. Payne.

Q. And by using this four percent figure, you determined that the goodwill of J. Truett Payne Company on May 28, 1974, was a hundred thousand? Is that your --

A. I don't have my calculator. The figure I have is a hundred fifteen thousand based on the fifty-two thousand five hundred that I had done previously. Forty-seven thousand five hundred times four percent per year for twenty years ought to come out to around a hundred thousand.

Q. So, to get --

A. About a hundred and two thousand.

I saw somebody doing the figure. I would guess around a hundred and two thousand.

Q. And you used this as a bench mark to verify your next figure; is that right?

A. Yes, to see how my next figure comes out.

Q. Your next method, your second method really

[TR. 267]

consists of trying to speculate as to what the market is going to be over the next few years?

A. And what the market was in 1974 and how well Payne would have done given non-discriminatory programs, say, rebates and quota programs that treated all dealers equally.

Q. Let me ask you this. Why do you pick to begin with the year 1974?

A. Well, because that's when we are trying to figure out what the value of

the firm was.

Q. Isn't it a standard practice to look at what the past record of the firm has been and then capitalize that figure over some period to determine the going concern of a business?

A. Yes, that's one method, yes.

Q. In fact, when you explained your methodology to me, you started with the year 1973, did you not, in one of your initial calculations?

A. I don't recall. I'm trying to think.

Q. Let me ask you this.

A. I think the question as it was put to me the other day was what was the value of the firm in May, 1974, and I said, well, you could figure out, well, one method you could use is to take 1974 and figure out what the stream of earnings from that point would be.

[TR. 268]

Q. Let me ask you this, Doctor. If you totaled up -- you have a copy of Mr. Payne's dealer records or dealer statements for the year '71 through the first quarter in '74?

A. Yes.

Q. If you had used those figures and had deducted from that figure your eighty-one some odd thousand that you figure he had payments coming to him, would you arrive at a loss or a profit for Mr. Payne over that four year period?

A. He would have lost about thirty thousand dollars.

Q. In fact, if you use the entire year of '74, you estimated he lost another twenty thousand?

A. I showed you that he had lost twenty-two thousand during the first four months of '74, but that he had suffered

discriminations of about sixteen thousand, so that for his total year he would have lost a total of twenty thousand.

Q. The first year -- you started in '71. Even adding in this figure of eighty-one thousand that you contend is his amount he's entitled to in incentive payments, the first year that you would show him making a profit would be in 1975?

A. 1976.

[TR. 269]

Q. '75 he lost again?

A. Yes.

Q. That's right, he did, didn't he. In fact, he lost another twenty thousand dollars?

A. No. He would have lost ten thousand in '75.

Q. And how did you determine he would have lost ten thousand?

A. Well, based on the fact that he was losing twenty thousand dollars in 1974 on a yearly basis and '75 would have been a bad year, but not as bad as '74 given the recovery of the economy during '75, the reduction in the rate of inflation and some of the solving of the problems in the car industry.

Q. You decided that it would be only half as bad?

A. Yes. '74 was a very bad year. Everything came together in 1974 to mess up the American automobile industry.

Q. Did you make a study to see what was actually happening in the automobile market in the Birmingham, Alabama area in 1975?

A. No, I did not.

Q. Do you know whether the Birmingham, Alabama sales area is a good sales area for Chrysler Corporation or a poor sales

area?

[TR. 270]

A. You mean relative to the country as a whole?

Q. Yes, that's right.

A. From some of the data I've seen, Chrysler did relatively poor in the Birmingham area than they did to the country as a whole, at least in the early years. I don't have it for 1975.

Q. Doesn't the failure to take that into account go considerably to your credibility of this ten thousand dollar figure you have arrived at as a loss figure for the year 1975?

A. The ten thousand dollar figure for 1975 is based on the year 1975 and is related to the previous years. Now, we do have previous results for Payne going back quite a long ways and Payne was a profitable dealer for many years in the

past regardless of how well Birmingham did relative to the country as a whole. He did suffering a lot of troubles in about 1970 and this was when these programs came in and started affecting him. My estimate of the ten thousand loss in '75 was based on the assumption that these discriminatory programs ceased to be discriminatory, that they continued to offer them on a non-discriminatory basis and Payne would then be able to compete on an equal basis with the other dealers in 1975 and I still thought that he would

[TR. 271]

lose money in '75, but not as much as he lost in '74.

Q. You say the sales incentive programs did not have an effect until 1970?

A. No, I did not say that, or if I did, I did not mean to say it. I did not

study them before that. I was actually told that I should study them and it was irrelevant to the case.

Q. The year 1976, you say it's going to be a banner year for Chrysler and for the automobile industry?

A. Yes.

Q. And so, then, to determine what J. Truett Payne Company would have done, assuming that it would have stayed in business that long, you looked at what he did in 1968 which on the information you have was his best year; is that right?

A. Correct. It was also Chrysler's best year prior to 1976. So, Chrysler had the best year in their history in 1968, Payne had its best year in history in 1968. I don't find that particularly coincidental.

Q. Let me --

A. Chrysler did have the best year

in its history in 1976. It is not unreasonable to assume that Payne would have had the best year in their history in

[TR. 272]

1976. Just as everything came together in 1974 to make 1974 a disaster, a lot of things came together in 1976 to make it a wonderful year for the American automobile industry.

Q. Did you make any determination how the industry did in the Birmingham, Alabama area on that date?

A. No.

Q. Did not. Did you make an analysis to see what the market structure was or where the locations were for the Chrysler Plymouth dealers in 1968 as compared to 1976?

A. The change I think is that in 1968 Vestavia or Hall was in Bessemer.

Q. That's right.

A. And I believe are still in business. They go in and out of business.

Q. Do you feel that the transfer of the dealer from Bessemer to Vestavia may well have affected what Mr. Payne would have done, may have prevented him from making as much profit than in '68?

A. Well, there are two things. Bessemer did move from Bessemer to Vestavia. So, if Vestavia were in existence in 1976 and were in business in Vestavia, this would take some of the business away

[TR. 273]

from Payne from that area; however, that area also is the most rapidly growing area in Birmingham in terms of both population and incomes and a very good area for car sales. The data we have and the most recent study that was done

for the City of Birmingham, which they didn't like by the way, by Brookins Institute, I'm sorry, Patelle Institute in Columbus, Ohio, indicates that almost, about half of all the population growth in the Birmingham area since 1970 has occurred in that part of the county, the southern part of the county and over into Shelby County.

Q. Well, if there was a dealer located out there at that time, that might substantially or might very well keep those people going to that dealership, wouldn't it?

A. Well, except that the data shows that Payne did a good part of his business in that area and that these people to a large extent, from a study I have done involving work habits, these people do work downtown, and other studies the marketing men have done indicate that

people do have this trade-off between purchasing from dealers near their house as opposed to where they work. Generally marketing people feel that a person would rather on a balance buy near his place of business rather than his place

[TR. 274]

of work. What you are saying, though, is basically correct, there would have been increasing competition between Payne and Vestavia in that area. What I'm saying is that in addition to that, however, this was such a rapidly growing area and that this was strong competition between Vestavia and Payne that both companies would have benefitted from this tremendous expansion in population and incomes in that area.

Q. And Mr. Payne would have received fifty thousand dollars in that year?

A. The fifty thousand dollars he would have received would have been the total from all his sales, not just those in the southern area. Yes.

Q. The year 1977, a good year, but not so bad for Chrysler, not as good as '76?

A. Right.

Q. Where did you get those figures?

A. Out of the Wall Street Journal.

Q. Did you check anything else?

A. Well, the Wall Street Journal shows car sales, total number of car sales for each company. It shows profit levels by quarter.

Q. Isn't the answer to my question no, you didn't check anything else?

[TR. 275]

A. Other sources?

Q. Yes.

A. No. The Wall Street Journal, they

summarize other sources.

Q. But, nevertheless, you decided you would knock down the profits there about half, then?

A. I went to twenty thousand dollars, yes.

Q. And what's the basis of that?

A. Well, it's more than half. I went from fifty to twenty thousand dollars. Chrysler sales in the country as a whole have been falling off. They're about thirteen percent below, twelve and thirteen percent below what they were in 1976. So, I'm assuming that the sales of Payne would have fallen in '77 relative to '76 and that the profits would have fallen more than their sales.

Q. And 1977, you then decided, -- the Judge cut you off, so you decided to determine the going concern value of the, or determine the value of the business in

the year 1977?

A. Yes. Judge Lynne said that it was too speculative to try to predict or estimate the amount of money that Payne would have made in 1978, so at that point I -- I had figured out what I thought they would make in 1978 and I discounted that. So, instead

[TR. 276]

I went back and changed and said, well, what was the value of the firm in 1977 as a going concern if it had stayed in business until 1977 had it been able to enjoy these two really good years after so many bad years which had hit the entire industry.

[TR. 277]

Q. Amd [sic] then you decided -- you assumed that you would be receiving $20,000.00 from then on?

A. That that would be a reasonable

estimation of the future stream of profits that J. Truett Payne would have earned, and that this would be a reasonable figure for a prospective buyer.

Q. Now, isn't the automobile business an up and down business, depending on what the company puts out, what new cars it puts out?

A. Yes, it's very competitive in that sense, and it's also based to a large extent on the general economy, the health of the economy. You can use unemployment rates, you can use Gross National Products or disposable income. Sometimes we use meeting incomes. We use a lot of aggregate figures for an industry like the automobile industry.

Q. And you picked the rate of ten percent to capitalize those figures?

A. Yes, that's a conservative estimate. The prime interest rate right

now is around six percent. You can borrow a short term from those banks at eight percent. Inflation rate is about six percent. A prospective buyer figuring that he is going to get about $20,000.00 a year in profits from the firm, if he buys into it, would

[TR. 278]

tend to be conservative in his discounting figure in terms of capitalizing the value. He would be a little worried about it, and he would not want to capitalize it at a six percent figure which would give him the much higher rate.

Q. In fact, what risk factor did you add in for this being an atuomobile dealership in determining your capitalization rate?

A. I didn't add in any specific risk factor other than what had been taken

into account from the previous year's earnings. Actually I wrote a paper once indicating that any entering of risk factors was double counting, because you already have your risks into your expected values. In the general literature on economics and financing there is a little difference between myself and the accepted theory in the field. We have expected value on one axis, and risk on the other, and yet the expected value has within it a risk term which is to say in trying to figure out these risk terms what we are doing is making a probability estimate of what the value of the firm would be or the value of the earnings or losses would be in a given year, and part of that risk factor then comes down to the discount rate that you use which is to say we then

discount these back to 1974, and to put in an additional risk factor on this is double counting. You're using it twice rather than just once.

Q. You total all of this up, and you came to a figure of $200,000.00?

A. Yeah, that's my estimate without my calculator, which is to say $200,000.00 in 1977 discounted back to 1974 at a six percent rate of discount looked to me like it would come out to about $170,000.00, and I did not figure that out.

Q. Which is $70,000.00 over what you had determined the value would be based on the good will method?

A. That's $70,000.00 more than the bench mark estimate which I was just using in order to come up with it.

Q. And what you did on the method

you prefer is really that you had to speculate what the earnings were going to be in the future, and then capitalize that, assuming they are going to earn twenty thousand dollars forever after the year 1977?

A. No, based on earnings of $50,000.00 in 1976, $20,000.00 in 1977, and a reasonable probability that $20,000.00 per year with ups and downs thereafter would be a reasonable estimate of what

[TR. 280]

that dealership would have been worth, given the non-discriminatory programs, if Payne could have lasted until then, that a prospective buyer coming along at that time would have been willing to pay somewhere around $200,000.00 for that dealership.

DR. George Ignatin

Redirect examination continued

[Tr. 705]

Q. Do you think it's unreasonable to devise an incentive program that pays a person an incentive based upon what he is able to do, what his strength is, what his potential is as opposed to the strength and potential of the other, say, Chrysler-Plymouth dealer? Is that a bad thing?

A. I would say that if you used a much better method than Chrysler used in Birmingham, it might have

[Tr. 706]

been fair. I really can't tell without having, you know -- it's a hypothetical question. What if they had used a fair non-discriminatory method? What would have happened? Well, what I have said is that what would have happened is Payne would have gotten $80,000.00 in

total monies and would still be in business today.

Q. Well, of course, you're ignoring the fact that he had lost another $30,000.00 on top of the 80?

A. No, I didn't ignore the fact that he had lost money. I said that he wouldn't have lost anywhere near what he had and counting in all of the monies he took out in executive salaries he would have unquestionably been in business today.

J. Truett Payne

[Tr. 711]

Q. (By Mr. Reeves:) One other question to Mr. Payne. Mr. Payne, you've heard some testimony today about -- and yesterday or Thursday rather about the used car operations at your facility during 1970 through '74. Can you tell the ladies and gentlemen of the jury whether or not you over-allowed for used

cars, and if so, why?

A. Yes. During those rebate periods when we didn't qualify, couldn't qualify, in order to meet competition and in order to sell new cars, we had to over-allow on our used cars. Now, that would naturally cut down on our profit on our used cars.

Q. What is over-allow mean, just for their information?

[Tr. 712]

A. It's this simple. If I have a customer that I'm trying to sell a new car to and if I offer him $800.00 for his car and he tells me that somebody else has offered him $850.00, in 99 cases out of 100 in order for me to get his business I've got to raise my bid on his -- on my used car to match the other bid. That's been going on since the beginning of the automobile industry. What people get for their used cars is of primary

interest to them. Now, the only way that I could do that, I was not getting any rebate on the program and I had to over-allow on the used car whereas if they had qualified for the program, in many cases they were getting $50.00, at some programs $100.00, some 30, but that put me at a disadvantage. It's that simple.

92-212

No. 91-212

Office - Supreme Court, U.S.
FILED
SEP 14 1992
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J. TRUETT PAYNE COMPANY, INC.,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

J. Ross Forman, III
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000
Counsel for Respondent

Of Counsel:
Thomas, Taliaferro, Forman,
Burr & Murray
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

QUESTIONS PRESENTED

Respondent objects to petitioner's questions presented for review since these questions are argumentative and contain statements as fact for which the Fifth Circuit Court of Appeals has on two separate occasions found there to be no evidentiary basis in the record. The only question presented by the petition is:

1. Whether the Supreme Court should review the finding of the Fifth Circuit Court of Appeals that there was insufficient evidence in the record to prove: (1) a violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a), (2) antitrust injury, and (3) the damages allegedly suffered?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
I. The Proceedings	2
II. The Facts	4
REASONS FOR DENYING THE WRIT	11
I. This Court Lacks Jurisdiction To Consider This Matter	11
II. No Question Of National Importance Is Presented	12
III. The Fifth Circuit's Opinion Is Not In Conflict With Any Decisions Of This Court Or Any Court Of Appeals	13
IV. Petitioner Is Really Requesting This Court To Resurrect The Discredited Automatic Damage Theory	15
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

Cases	Page
Alterman Foods, Inc. v. FTC, 497 F.2d 993 (5th Cir. 1974)	13
American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951)	13
Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972)	14
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)	15
Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967)	13
Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947)	15
Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575 (1982)	2, 4
Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 607 F.2d 1133 (5th Cir. 1979), *vacated*, 451 U.S. 557 (1981)	3
Colonial Stores, Inc. v. FTC, 450 F.2d 733 (5th Cir. 1971)	13
Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965)	13
Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970)	16
FTC v. Morton Salt Co., 334 U.S. 37 (1948)	14
Hanover Shoes, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)	14
Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974)	13
Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973)	13
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	14

TABLE OF AUTHORITIES – Continued

Page

J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 2, 3, 4, 12

Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979) 13

NLRB v. Hendricks City Rural Electric Corp., ___ U.S. ___, 70 L. Ed.2d 323 (1981) 12

Perkins v. Standard Oil Co. of California, 395 U.S. 642 (1969) 14

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 14

Rudolph v. United States, 370 U.S. 269 (1962) 12

Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924) 12

Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974) 13

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 15

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 15

Statutes:

Clayton Act, Section 2 (Robinson-Patman Act), 15 U.S.C. §13 ..... i, 2, 3, 12, 13, 17

Supreme Court Rule 17 12

Supreme Court Rule 20 11

Supreme Court Rule 21 ..... 11, 12

Supreme Court Rule 33 11

28 U.S.C. §2101(c) 11

Other Authorities:

H.R. Conference Rep. No. 2951, 74th Cong., 2d Sess. (1936) 17

No. 81-212

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

J. TRUETT PAYNE COMPANY, INC.,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case is unacceptable since it is incomplete and, like the entire petition, is full of misstatements as to what the probative evidence in the record proved. The Fifth Circuit Court of Appeals has now twice reviewed the evidence in this case and has twice found the evidence insufficient to support a verdict in favor of the petitioner, J. Truett Payne Company, Inc. (hereinafter sometimes referred to as "Payne"). While we do not intend to summarize the Fifth Circuit's opinions, we do feel compelled to point out the most blatant misstatements and omissions of the petitioner so that this Court will not be misled by the petition.

I. The Proceedings.

This is a §2(a) Robinson-Patman Act, 15 U.S.C. §13(a), secondary line price discrimination case wherein the petitioner asserted that certain sales incentive programs[1] sponsored by the respondent, Chrysler Motors Corporation[2] (hereinafter sometimes referred to as "Chrysler"), resulted in price discrimination.

Following the adverse jury verdict and denial of its motion for judgment notwithstanding the verdict or for new trial, Chrysler appealed to the Fifth Circuit Court of Appeals on several separate and distinct grounds, summarily categorized as follows:

> First, that there was a total failure of proof of a violation of §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a), since each sales incentive program was carefully designed to provide all Chrysler dealerships with an equal opportunity to participate therein and to receive equal incentive payments for equivalent performance. Chrysler also argued there was insufficient evidence to prove that there was a reasonable possibility that injury to competition might result from the programs;
>
> Second, that petitioner was not entitled to recover damages under §4 of the Clayton Act, 15 U.S.C. §15, since it had failed to prove (1) that it had in fact suffered antitrust injury as a proximate consequence of said programs and (2) the amount of antitrust damage allegedly suffered;
>
> Third, that several parts of the trial judge's charge to the jury were erroneous.
>
> Fourth, that several evidentiary rulings by the trial judge were erroneous.

---

[1]The sales incentive programs involved in this case are adequately described in this Court's decision in *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 559-60 (1981) (App. 13-14), and in the Fifth Circuit's decision of *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 578-79 (1982) (App. A-5 - A-7).

[2]Chrysler Motors Corporation is a wholly owned subsidiary of Chrysler Corporation.

In its initial decision, the Fifth Circuit only found it necessary to consider the question of whether the requirements of §4 of the Clayton Act had been satisfied. The court held that petitioner had not satisfied the requirements for recovering damages under §4 since it (1) failed to prove that it had sustained cognizable antitrust injury from the sales incentive programs and (2) failed to prove the approximate amount of any such injury. *Chrysler Credit Corp. v. J. Truett Payne*, 607 F.2d 1133 (5th Cir. 1979) (App. 25-33).

Following the Fifth Circuit's initial decision, this Court granted *certiorari*. Contrary to petitioner's assertion (Pet. 3, 5, 25), this Court did not reverse the Fifth Circuit's decision. Instead, this Court unanimously rejected the petitioner's "automatic damage" argument, and then, in a 5 to 4 decision, vacated the Fifth Circuit's judgment and remanded with the instruction that the Fifth Circuit should first decide whether Chrysler's sales incentive programs violated §2(a) of the Robinson-Patman Act before considering petitioner's injury and damage evidence. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (App. 11-24). The Court made it clear that it was intimating no view on how the injury and damage issue should be decided if the Fifth Circuit found a violation of the Robinson-Patman Act on remand; however, the Court did point out that the petitioner's injury and damage evidence was weak and not nearly as substantial as the evidence in the cases where this Court had found sufficient evidence of injury and damage. 451 U.S. at 565, 567, 568 (App. 19, 21, 22).

On remand, the Fifth Circuit did exactly what this Court had directed. The parties were directed to file supplemental briefs containing specific references to the evidence in the record. After reviewing these briefs and the record, the Fifth Circuit found that the record did not contain sufficient evidence to permit the jury to find a violation of §2(a), antitrust injury, or damage, and, again, directed judgment to be entered in favor of Chrysler. In making its decision on injury and damage, the Fifth Circuit gave due consideration to the leniency cases cited in this Court's decision in this case. The court did not consider

or decide any of Chrysler's other grounds for reversal, including whether the defense of availability had been proven, or whether the trial judge had committed error in the challenged evidentiary rulings and instructions to the jury. *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575 (5th Cir. 1982) (App. A-1 - A-15).

II. The Facts.

Petitioner's misstatements and omissions of facts necessitate a restatement of the evidence or lack of evidence.

Petitioner asserts that during the period involved in this case, it competed with three other Chrysler dealers located in the greater Birmingham metropolitan area, and that customers compared Payne's prices with prices of each of the other three dealers. The evidence petitioner cites as proving this assertion is the hearsay testimony of Mr. Payne that customers had told him that they shopped prices.[3] (Pet. 5, 6) (Tr. 45-46, 124; App. 64-67, 139). No other evidence was offered to prove that these three dealers competed with Payne or to prove the degree of competition.

Petitioner then uses these assertions as a spring board for his claim that the sales incentive programs allowed the allegedly competing Chrysler dealers to undersell it, which caused Payne to lose new car sales and to lose profits by having to reduce its resale price by overallowing on used cars traded-in. Again, as this Court has already noted, the evidence petitioner relies on to prove underselling is Mr. Payne's hearsay testimony of what customers and salesmen told him. *J. Truett Payne Co.*, 451 U.S. 563, 564, 570 (App. 17, 18, 24). *See also, Chrysler Credit Corp.*, 670 F.2d at 581 (App. A-11). No corroborating evidence of any kind was offered to support Mr. Payne's bare assertion. No alleged competitor testified as to what he did with the incentive money he received, and no customer or salesman testimony was offered. Additionally, no comparative pricing evi-

[3]All hearsay testimony in this case was duly objected to by Chrysler, but was overruled by the trial court. (Tr. 47, 48; App. 68, 70).

dence was offered. In fact, there is no evidence of what Payne or any of the other Chrysler dealers were selling cars for during any of the challenged incentive programs. Moreover, Mr. Payne contradicted his hearsay and conclusory testimony of underselling by admitting that he did not think that his competitors passed the incentive money on to the retail customers by way of price reductions. (Tr. 85; App. 91).

Petitioner's evidence of overallowance on used car trade-ins and new car lost sales is as lacking as its evidence of underselling. Not only is there no evidence to link overallowances and lost sales to the incentive programs, there is no probative evidence of any overallowances or lost sales. The evidence petitioner cites to prove overallowances and lost sales (Tr. 55, 65-70, 91-95, 124-127, 711-712; App. 77, 80-87, 97-104, 139-142, 215-217), is nothing other than Mr. Payne's speculative, conclusory allegations to this effect. No corroborating evidence of lost sales or overallowances was introduced. In fact, Mr. Payne admitted on cross-examination that he did not have any evidence that he had lost any sales because of the incentive programs. (Tr. 93; App. 100-101). Further, Mr. Payne demonstrated that his overallowance testimony was speculative by prefacing this testimony with the statement that he would *possibly* have to overallow on trade-ins in order to make a deal. (Tr. 55; App. 77). If Payne had in fact ever overallowed, it could easily have been proven through Payne's sales records; however, no such evidence was offered.

As might be expected, since this Court's decision in this case, wherein Petitioner's evidence was characterized as weak, petitioner has devised two new evidentiary arguments to try and bolster its claims of overallowance and lost sales. In fact, Payne candidly admitted that it had never presented these arguments to this Court before. (Pet. 19, 20-21). One questions how petitioner could have overlooked what it now contends to be such critical evidence. However, a review of the record answers this question – there is no factual basis to support these arguments. Further, these arguments were made to the Fifth Circuit upon remand and were rejected.

Petitioner's overallowance argument is based on the fact that Payne realized the smallest profit on its used car sales of any of the Chrysler dealers in the Birmingham metropolitan area. Payne claims that this somehow proves that it overallowed on trade-ins. (Pet. 7, 8, 20-22). However, petitioner never introduced any evidence to show any causal connection between the low used car profits and the alleged overallowances. In fact, as already pointed out, there was no probative evidence that any overallowances had ever been made. Moreover, Mr. Payne attributed his low used car profits to having to wholesale his used cars because he could not obtain adequate used car financing to maintain the used cars in stock.[4] (Tr. 98-100, 122; App. 108-112). Additionally, the low used car profit margin would only reflect an overallowance on trade-ins if petitioner entered the trade-in on its books at the inflated value allowed. Petitioner never offered any evidence to prove whether it entered used car trade-ins on its books at the inflated or real value. Further, since an overallowance on a trade-in is nothing other than a reduction of the new car sales price, logic suggests that any overallowance would be reflected in the new car gross profit rather than in the used car profit. Interestingly, during the period involved in this case, Payne realized the highest average new car gross profit of any of the Chrysler dealers in the Birmingham area. (Def. Ex. 31, App. 54).

The statistical evidence in the case also demonstrates that the low used car profit realized by Payne was not the result of overallowances caused by the sales incentive programs. This is evident from a comparison of Defendant's Exhibits 31 and 36.[5] As these exhibits show, in 1972 Payne received its lowest bonus per new retail unit sold of any of the years involved in this case. (Def. Ex. 36). However, in this same year (1972), Payne real-

---

[4]This testimony by Mr. Payne also totally undermines the unsupported speculation by petitioner that the low used car profits caused a reduction in Payne's used car financing. (Pet. 20). According to Mr. Payne, the credit restriction is what caused the low used car profit, not vice versa.

[5]Defendant's Exhibit 31 is set forth on pages 54 and 55 of the Appendix to the petition the pertinent part of Defendant's Exhibit 36 provided:

ized its highest gross profit on used car sales and lost less money than during 1971 or 1973, when it received the largest bonus per new retail unit sold of any of the Birmingham Chrysler dealers. (Def. Ex. 31, App. 55). If the sales incentive programs had forced Payne to overallow on trade-ins as it contends, Payne's 1972 used car profit should have been less than its 1971 and 1973 used car profits, since it received a smaller bonus per new retail unit sold in 1972 than any of the other dealers. (Def. Ex. 36). Payne completely failed to prove that its used car performance was in any way connected to how it performed in any of Chrysler's sales incentive programs.

Petitioner's other new evidentiary argument is an attempt to show lost sales by comparing Payne's new car sales and profits in 1968 to sales and profits for the years 1970-1974. (Pet. 7-8, 12-13, 19). There is no evidentiary basis in the record for making this comparison. In fact, there is a virtual void of evidence concerning the year 1968. This demonstrates the after-the-fact nature of this argument. The only evidence concerning 1968 is Payne's 1968 Dealer Financial Statement (Pet. Ex. 61) which was introduced into evidence solely to assist petitioner's expert with his "going concern" value testimony. (Tr. 213-14; App. 165-67). No evidence was introduced to show the competitive nature or makeup of the market in 1968. No evidence was introduced as to how the various dealers performed under the incentive programs or whether Chrysler ever offered any sales incentive programs during 1968. Additionally, the speculative calculations which petitioner had to undertake to attempt to make use of the year 1968 (Pet. 7, n. 2) demonstrates that the petitioner never intended to use 1968 data to show lost sales. Petitioner simply failed to lay the evidentiary foundation necessary to allow 1968 to be compared to anything.

AVERAGE INCENTIVE MONEY PAID
PER NEW RETAIL UNIT SOLD

DEALER	1971	1972	1973
Payne	$72.00	$34.00	$51.00
Central	59.00	80.00	40.00
Roebuck	63.00	62.00	28.00
Vestavia	55.00	72.00	32.00

One of petitioner's most glaring misstatements of evidence is its assertion that 1968 was the only non-discriminatory year for which there was evidence. (Pet. 7). No cite was given to support this assertion, and none could be given, since, as pointed out, there is no competitive information in the record concerning 1968 and no information as to whether any sales incentive programs were conducted or not during that year. In fact, petitioner's expert, Dr. Ignatin, testified that he had been *advised* that sales incentive programs conducted prior to 1970 would be irrelevant to this case. (Tr. 271; App. 200-201). Payne's assertions concerning the year 1968 represent nothing other than sheer speculation.

Furthermore, the 1968 comparison is faulty since the retail market underwent change during the years 1970-1973. For example, Roebuck was obviously not in full operation in 1968 since it did not receive its franchise until April, 1967. (Plt. Ex. 55). If Roebuck was indeed in competition with Payne, as Payne alleges, Payne's percentage share of the market should have decreased as Roebuck became a market force. Additionally, in May, 1971, Hall Motor Company moved its dealership from Bessemer, Alabama to Vestavia, Alabama. (Tr. 318-319; Plt. Ex. 55). This relocation could well have affected the petitioner's percentage share of the market. (Tr. 272-274; App. 202-205). Further, petitioner's Dealer Financial Statements offer an explanation for Payne's decrease in percentage share of the market after 1968, since Payne had reduced the number of new car salesmen which it employed. In 1968, Payne employed 12 new car salesmen, while it only employed 9 in 1970 and 6 in the years 1971 through 1973. (Plt. Ex. 32, 33, 34, 35, 61). Petitioner simply failed to introduce sufficient evidence to connect the sales incentive programs with any changes in petitioner's market share percentage in 1968 or any other year.

Petitioner's expert, Dr. Ignatin, offered no probative evidence of injury to competition, actual competitive injury to Payne, or the amount of damage allegedly suffered. Dr. Ignatin's injury testimony was limited to unsupported hypothetical analysis of the predicted effects of the sales incentive programs.

J. Truett Payne, 451 U.S. at 570 (App. 24); *Chrysler Credit Corp.*, 670 F.2d at 581 (App. A-11). (Tr. 202-204; App. 146-150). Dr. Ignatin even prefaced his injury testimony with the caution that his testimony was based to some degree on speculation. (Tr. 202; App. 147). Dr. Ignatin made no investigation into whether the Chrysler dealers made competitive use of the incentive money received and offered no specific testimony concerning lost sales or overallowances on trade-ins. (Tr. 255-256; App. 182). In fact, Dr. Ignatin's testimony *conflicted* with Mr. Payne's allegations of underselling by competitors since he concluded that the predicted effect of the sales incentive programs was to keep retail prices at an artificially *high* level. (Tr. 202-204; App. 146-150). Dr. Ignatin failed to offer any probative evidence that there was a *reasonable* possibility that the incentive programs would substantially injure competition among the Birmingham Chrysler dealers.

Dr. Ignatin's damage testimony is also lacking since he failed to offer any testimony as to the profits lost from lost sales or overallowances on trade-ins. Having failed to quantify the alleged lost profits, Dr. Ignatin could not connect the sales incentive programs to the petitioner's business failure. Additionally, Dr. Ignatin's "going concern" value testimony was based on speculation and assumptions which were not supported by the evidence in the record. *Chrysler Credit Corp.*, 670 F.2d at 582 (App. A-13 - A-14). Dr. Ignatin failed to consider local market changes or conditions in making his "going concern" testimony and failed to give any consideration to the future sales which reasonably could have been expected or the cost which would have been incurred in making said sales. *Id.* (Tr. 265, 270-272; App. 192, 202). Moreover, the evidence proved that Dr. Ignatin's basic assumption – that the local dealers' performances reflected Chrysler's overall performance – was erroneous. For example, the evidence demonstrated that the local Birmingham Chrysler dealers were experiencing a decline in profits over the period 1970 through 1973, while Chrysler was experiencing an increase in profits. (Tr. 606-608). Further, the local dealers did not experience the high losses experienced by Chrys-

ler in 1974 and 1975 nor the large increase in profits experienced by Chrysler in 1976. (Tr. 609-610).

Besides misstating the evidence, petitioner neglected to mention other important facts proven by substantial evidence. Petitioner failed to point out that each of the sales incentive programs lasted only a few months in duration, and, that even under the petitioner's method of calculating the alleged amount of the price discrimination, the per unit difference between what the best performing dealer and what the worst performing dealer received under each program was generally quite small. (Plt. Ex. 37-54; App. 36-53). There was no evidence introduced to show that if such a difference had been reflected in a price reduction, or if other competitive use had been made of the price difference, sales would have been diverted to the so-called favored dealer. Additionally, because of the very nature of the programs, the evidence showed that the so-called price advantage constantly shifted among all four of the Chrysler dealers in the Birmingham metropolitan area, including the petitioner. (Plt. Ex. 37-54; App. 36-53). The inherent fairness of the programs was demonstrated by the fact that over the period involved in this litigation, the average difference between what the best performing dealer and the worst performing dealer received was only *eleven dollars* per car. *Chrysler Credit Corp.*, 670 F.2d at 581 (App. A-12). (Tr. 580-82; Def. Ex. 37).

Payne also neglected to point out that it devoted c rable sales attention toward making fleet sales.[6] During the period involved in this case, over twenty-four percent of Payne's new car sales were fleet sales. (Tr. 104, App. 118; Def. Ex. 31, App. 54). Payne's efforts toward making fleet sales were not unrewarded since Chrysler sponsored fleet sales incentive programs in addition to their retail sales incentive programs. (Def. Ex. 2). During the period involved in this suit, Payne received

[6]A fleet sale is a new car sale to a qualified fleet purchaser (one who purchases in large numbers), such as the Alabama Power Company. (Tr. 77-78; App. 87-88).

$62,185.00 under fleet sales incentive programs, while the next highest Chrysler dealer in the Birmingham area received only $7,185.00. (Def. Ex. 27). When the money received under the fleet programs is combined with the money received under the retail sales incentive programs, Payne received $161,122.78, while Roebuck received $141,590.00, Central $102,784.29, and Hall $80,555.00. (Def. Ex. 27, 28).

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction To Consider This Matter.

Petitioner's motion for rehearing was denied by the Fifth Circuit on April 26, 1982. (App. A-16). The ninety day period for filing a Petition for a Writ of *Certiorari* with this Court expired on Sunday, July 25, 1982, making Payne's petition due to be filed on Monday, July 26, 1982. Payne's petition was received by the Clerk of this Court on Monday, July 26, 1982, but the Clerk refused to accept the petition due to the failure of Payne to follow Rules 21 and 33 of this Court's Rules. The corrections required by the Clerk were not received until August 6, 1982, yet the Clerk marked the petition as filed on July 26, 1982, the day it was initially received. Certainly, the ninety days allowed by 28 U.S.C. §2101(c) was sufficient time for filing a petition which satisfied the Rules of this Court, and petitioner's failure to do so should not be excused. The Clerk should not have back dated the filing of the petition to July 26, 1982, and the petition should have been rejected as untimely. Sup. Ct. Rule 20.3.

Additionally, the petition violates other Rules of this Court which justify denying the petition. Rule 21.1(a) requires the questions presented for review to be short, concise and not argumentative. Petitioner's questions are argumentative and full of conclusory statements of fact for which the Fifth Circuit has twice found there to be no evidentiary basis in the record. The petition is nothing other than a brief on the merits which fails to clearly articulate any special and important reasons for grant-

ing the petition, as required by Rule 17. These failures constitute grounds for denying the petition. Sup. Ct. Rule 21.5.

II. No Question Of National Importance Is Presented.

The petition is really nothing more than an argument on the merits challenging the Fifth Circuit's ruling on the sufficiency of the evidence. The petition raises no issue of national importance for this Court to decide. The only issue of national importance ever involved in this case was the question of whether the "automatic damage" theory, which had split the Circuit Courts of Appeal, was a viable damage theory in a §2(a) Robinson-Patman Act treble damage case. This Court unanimously rejected the automatic damage theory and remanded the case to the Fifth Circuit to consider whether there was sufficient evidence to establish a violation of §2(a), and, if so, whether there was sufficient evidence to prove antitrust injury and the amount of damage. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (App. 11-24).

In accordance with this Court's instructions, the Fifth Circuit again reviewed the evidence in the record to determine whether there was sufficient evidence of a violation of §2(a), antitrust injury, and the amount of antitrust damage. The court even directed the parties to file supplemental briefs containing specific references to the record to support their positions. *Chrysler Credit*, 670 F.2d at 578 (App. A-5). After reviewing the briefs and making a second review of the record, the Fifth Circuit concluded that there was insufficient evidence to prove a violation of §2(a), antitrust injury, or the amount of damage. The Fifth Circuit's opinion is purely a decision on the sufficiency of the evidence in this case which has no importance to anyone other than the individual parties. As this Court has noted numerous times, sufficiency of the evidence cases do not merit consideration by this Court. *NLRB v. Hendricks City Rural Electric Corp.*, ____ U.S. ____, 70 L. Ed.2d 323, 330 n. 8 (1981); *Rudolph v. United States*, 370 U.S. 269 (1962) (*per curiam*); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

There is no reason for this Court to monitor the Fifth Circuit as to the sufficiency of the evidence, especially after this Court has already found Payne's evidence to be weak and less substantial than the evidence in any case where this Court has found sufficient proof of antitrust violation, injury and damage. *J. Truett Payne*, 451 U.S. at 565, 567, 570 (App. 19, 21, 24). Accordingly, the petition should be denied.

III. The Fifth Circuit's Opinion Is Not In Conflict With Any Decisions Of This Court Or Any Court Of Appeals.

Petitioner attempts to make an argument that the Fifth Circuit has imposed an unreasonably strict standard for proving a violation of §2(a) of the Robinson-Patman Act, antitrust injury, and the amount of damage, which is in conflict with decisions of this Court and other Courts of Appeals. However, this argument is undermined by petitioner's constant citing of Fifth Circuit cases for what constitutes the proper standard of proof for each of these elements. For example, as representing the proper standard of proof of a violation of §2(a), petitioner cites: *Alterman Foods Inc. v. FTC*, 497 F.2d 993 (5th Cir. 1974) (Pet. 14); *Colonial Stores, Inc. v. FTC*, 450 F.2d 733 (5th Cir. 1971) (Pet. 14); *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967) (Pet. 15); and *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965) (Pet. 15). As representing the proper standard for proving antitrust injury, petitioner cites: *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974) (Pet. 12, 25); *Foremost Dairies, Inc. v. FTC, supra* (Pet. 25); and *American Can Co. v. Bruce's Juices*, 187 F.2d 919 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951) (Pet. 25). And, as representing the proper standard to prove the amount of antitrust damage, petitioner cites: *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266 (5th Cir. 1979) (Pet. 28); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974) (Pet. 28); and *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894

(5th Cir. 1973) (Pet. 29). It is clear from the Fifth Circuit's opinion that the court was well aware of these decisions and simply concluded that the standards of proof announced in these cases had not been satisfied by the petitioner.

The Fifth Circuit's decision is not in conflict with *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) or its progeny, since this is a treble damage case, not an injunction case. This Court has already recognized this important distinction and has held that *Morton Salt* and its progeny are not relevant to the facts in this case. *J. Truett Payne*, 451 U.S. at 561 (App. 15). Moreover, as pointed out by the Fifth Circuit, the petitioner's evidence failed to establish any of the facts upon which *Morton Salt* and its progeny were based. *Chrysler Credit*, 670 F.2d at 581 (App. A-12).

Petitioner's reliance on *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969) and *Bargain Car Wash, Inc. v. Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972) is also misplaced, since there was substantial evidence of a violation of §2(a), antitrust injury, and damages in these cases. In *Bargain Car Wash*, there was substantial probative evidence of underselling by the favored competitors, along with evidence of increased sales volume by the favored competitors and a corresponding sales loss of over forty percent by the plaintiff. 466 F.2d at 1170. Likewise, in *Perkins v. Standard Oil Co.*, there was substantial probative evidence of underselling by the favored competitors coupled with evidence of a corresponding loss of business by the disfavored plaintiff. 395 U.S. at 645, 648, 649. There was no such probative evidence in the case at bar.

The Sherman Act cases of *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Hanover Shoes Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) are of no help to petitioner since each of these cases involved a *per se* violation of the Sherman Act. In such cases, there is no need to prove any competitive injury. However, competitive injury must be proven in a §2(a) treble damage action. *J. Truett Payne Co. v. Chrysler Motors Corp.*,

supra. This Court has recognized the fundamental differences between the Sherman Act and the Robinson-Patman Act and has stated that the "entire basis for judging under the two Acts is different and that the case law as to the Sherman Act does not fit the Robinson-Patman Act." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 756 (1947). *See, United States v. United States Gypsum Co.*, 438 U.S. 422, 450-51 (1978).

Finally, the Fifth Circuit's decision in no way conflicts with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) or *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946). As this Court has recognized, much more substantial evidence of antitrust injury and damage was present in *Bigelow* and *Zenith* than was present in the case at bar. *J. Truett Payne Co.*, 451 U.S. at 567 (App. 21). Further, it is clear from the Fifth Circuit's opinion that it gave due consideration to the leniency standard of proof expressed in *Zenith* and *Bigelow*, yet, still concluded that the evidence was insufficient to prove antitrust injury and damage.

In short, the Fifth Circuit merely held that a violation of §2(a), antitrust injury, and the amount of damage could not be proved by speculative, conclusory, or hypothesized testimony for which there was no support in the record. None of the cases cited by the petitioner stand for the proposition that the requirements necessary to recover treble damages may be proved by such testimony.

IV. Petitioner Is Really Requesting This Court To Resurrect The Discredited Automatic Damage Theory.

When all of petitioner's evidentiary arguments are cut through, it is clear that what Payne is really asking this Court to do is to overrule its prior unanimous holding and to resurrect the "automatic damage" theory. Payne's position is brought to light by the last sentence on page 11 of the petition, by the first sentence on page 16, and by the last sentence on page 22. On each occasion, the petitioner asserts that antitrust injury

and damage may be presumed from evidence of a substantial price discrimination in a market of keen competition. (Pet. 29). This assertion is nothing other than a restatement of the automatic damage theory. *See, Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). This Court has already unanimously rejected this theory, and there is no reason for reconsidering it. *J. Truett Payne*, 451 U.S. at 561 (App. 15).

Petitioner attempts to disguise what it is really seeking by stating:

> Payne is not contending that price discrimination coupled with other corroborating evidence, *automatically* infers injury. Chrysler is free to show that the disfavored purchaser was not injured in any way by the discriminatory prices.

(Pet 31). Payne is attempting to avoid this Court's earlier rejection of the automatic damage theory by asking the Court to adopt the automatic damage presumption of injury but to not make the presumption conclusive, so that the defendant may attempt to disprove injury. In other words, Payne wants the burden of proof shifted from the plaintiff to the defendant. This Court has already rejected this idea by making it clear in its opinion in this case that even if a violation of the Robinson-Patman Act was proved, Payne was not excused from its burden of proving antitrust injury and damages. *J. Truett Payne*, 451 U.S. at 568 (App. 22).

Petitioner also seeks to breathe new life into the automatic damage theory by insisting that the amount of the price discrimination be recognized as a measure of damage. (Pet. 28-30). Payne argues that this Court's rejection of the automatic damage theory did not preclude the amount of the price discrimination being presumed to measure the damage suffered once antitrust injury was proved, since the automatic damage argument was a proximate cause argument, not a measure of damage argument. (Pet. 30). This simply is not true. As *Fowler Mfg. Co. v. Gorlick, supra*, makes clear, the automatic damage argument is both a causation and a measure of damage

argument, since under this theory, the amount of the price discrimination was presumed to represent the minimum damages suffered. Thus, the Court has already rejected petitioner's contention. Further, it is axiomatic that antitrust damage must approximate the antitrust injury suffered. *Zenih Radio Corp. v. Hazeltine Research, Inc., supra*; *Bigelow v. RKO Radio Pictures, Inc., supra.* In this case, it is clear that the amount of the price discrimination does not measure the antitrust injury which the petitioner claims it suffered — *i.e.,* lost sales and overallowances on trade-ins. Thus, the alleged price discrimination is not a measure of damage in this case.

Moreover, Plaintiff's argument that the amount of the price discrimination is a proper measure of damage flies in the face of the legislative history of the Robinson-Patman Act. As this Court has noted, the Senate version of the Robinson Bill established the amount of the price discrimination to be the minimum measure of damage. *J. Truett Payne,* 451 U.S. at 562 (App. 16). The Bill was then changed to authorize presumptive damages in the amount of the price discrimination only after the plaintiff had otherwise proven the "fact of damage." *Id.* at 563 (App. 17). Nevertheless, this provision was eliminated by the Conference Committee with the pronouncement that:

> "The Senate Bill set up a *new measure of damages* for violations of the law, whereas the House Bill left the damages to be determined in accordance with the provisions of the existing Clayton Act. The Senate receded."

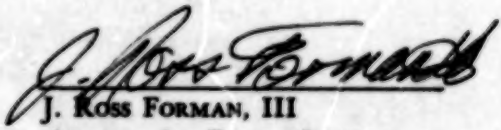
H.R. Conference Rep. No. 2951, 74th Cong., 2d Sess. (1936). Thus, it is clear that Congress did not intend for the amount of the price discrimination to be a measure of the damages suffered by a violation of §2(a) of the Robinson-Patman Act.

CONCLUSION

Upon remand, the Fifth Circuit did exactly what this Court asked. It reviewed the evidence to determine whether there was proof of a violation of §2(a) and reconsidered its injury and damage decision in view of this Court's leniency standard. Upon its review of the evidence, the Fifth Circuit found that there was not sufficient evidence in the record to prove a violation of §2(a), antitrust injury, or the amount of damage. Having disposed of the only issue of national importance meriting its review, namely, the automatic damage issue, this Court should not now undertake merely another review of the evidence.

For these reasons, it is respectfully submitted that the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,



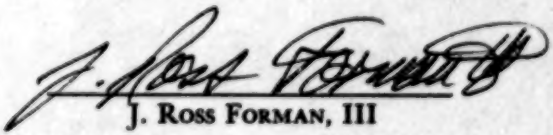
J. Ross Forman, III
Attorney for Respondent,
Chrysler Motors Corporation
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

Of Counsel:
Thomas, Taliaferro, Forman,
Burr & Murray
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

CERTIFICATE OF SERVICE

I, J. Ross Forman, III, a member of the Bar of this Court, hereby certify that three copies of Respondent's Brief In Opposition have been served upon the Honorable C. Lee Reeves, attorney of record for petitioner, at 2222 Arlington Avenue, South, Birmingham, Alabama, 35205, by depositing the same in the United States mail, first class postage prepaid, and properly addressed on this the 10th day of September, 1982.

It is further certified that all parties required to be served have been served.



J. ROSS FORMAN, III